TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~141~~ 141.

EAST CENTRAL EUREKA MINING COMPANY, JAMES TOMAN, AND ELIZA A. TOMAN, PLAINTIFFS IN ERROR,

vs.

CENTRAL EUREKA MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 31, 1905.

(19,949.)

(19,949.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 447.

EAST CENTRAL EUREKA MINING COMPANY, JAMES TOMAN, AND ELIZA A. TOMAN, PLAINTIFFS IN ERROR,

vs.

CENTRAL EUREKA MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 & 2 In the Supreme Court of the United States.

THE EAST CENTRAL EUREKA MINING COMPANY (a corporation), James Toman and Eliza A. Toman, Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY, (a corporation), Defendant in Error.

Campbell, Metson & Campbell, attorneys for plaintiffs in error.
Galpin & Bolton, of counsel for said plaintiffs.
Olney & Olney, attorneys for Central Eureka M. Co., defendant in error.
W. J. McGee and C. H. Lindley, of counsel for said defendant.

3 *Writ of Error.*

No. —.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the State of California, Greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the supreme court of the State of California before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the East Central Eureka Mining Company (a corporation), James Toman and Eliza A. Toman, defendants and plaintiffs in error, and Central Eureka Mining Company (a corporation), plaintiff and defendant in error, wherein was drawn in question the validity of a statute of, and an authority exercised
4 under, the United States, and the decision was against their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, or statute thereof, and the decision was against the right, title, privilege or exemption expressly set up or claimed under such clause of said Constitution, statute or commission, a manifest error hath happened, to the great damage of the said East Central Eureka Mining Company, a corporation, James Toman and Eliza A. Toman, plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of

the United States, together with this writ, so that you may have the same at Washington on the twenty-seventh day of November
5 next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the third day of October, 1905.

[Seal U. S. Circuit Court, Northern Dist., Cal.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States in and for the Northern District of California.

Allowed, this 3rd day of October, 1905, by:

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

6 Service of the within writ of error and receipt of a copy thereof admitted this 3rd day of October, 1905.

OLNEY & OLNEY,
Attorneys for Defendant in Error.

7 I, Frank C. Jordan, hereby certify that a copy of the foregoing writ of error was, on the 3 day of October, 1905, lodged in the clerk's office of the said supreme court of the State of California, for said plaintiffs in error.

[Seal Supreme Court of California.]

FRANK C. JORDAN,
Clerk of the Supreme Court of the State of California,
By G. H. S. DRYDEN,
Deputy Clerk of the Supreme Court.

8 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Central Eureka Mining Company, a corporation, and to Messrs. Olney & Olney, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be held in the city of Washington, District of Columbia, United States of America, within sixty (60) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein the East Central Eureka Mining Company, James Toman

and Eliza A. Toman are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and why speedy
9 justice should not be done to the parties in that behalf.

Witness, the Honorable W. H. Beatty chief justice of the supreme court of the State of California, the 3rd day of October, 1905.

W. H. BEATTY,
Chief Justice.

Service of the within citation and receipt of a copy thereof admitted this 3rd day of October, 1905.

OLNEY & OLNEY,
Attorneys for Defendant in Error.

10 Sac. No. 1095.

In the Supreme Court of the State of California.

CENTRAL EUREKA MINING COMPANY (a Corporation), Respondent,
vs.
THE EAST CENTRAL EUREKA MINING COMPANY (a Corporation) *et al.*, Appellants.

Transcript on Appeal from Judgment and Order of Superior Court of County of Amador. Honorable R. C. Rust, Judge.

Campbell, Metson & Campbell, attorneys for James Toman and Eliza A. Toman, appellants.
Galpin & Bolton, of counsel for said appellants.
Olney & Olney, attorneys for Central Eureka M. Co., respondent.
W. J. McGee and C. H. Lindley, of counsel for said respondent.

Filed this — day of August, A. D. 1902.

GEO. W. ROOT, *Clerk*,
By —— ——,
Deputy Clerk.

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13 In the Supreme Court of the State of California.

Transcript on Appeal.

In the Superior Court, County of Amador, State of California.

CENTRAL EUREKA MINING COMPANY (a corporation), Plaintiff,
vs.
THE EAST CENTRAL EUREKA MINING COMPANY (a corporation), JamesToman, Eliza A. Toman, John Doe and Richard Roe, Defendants.

Complaint.

The plaintiff above named complains of the defendants above named and for cause of action alleges:

That the plaintiff is and since the 25th day of October,
14 1894, has been a corporation duly incorporated under the laws of the State of California.

That the defendant, the East Central Eureka Mining Company, is, and since the 12th day of May, 1900, has been, a corporation duly incorporated under the laws of the State of California.

That the defendants, James Toman and Eliza A. Toman, are husband and wife.

That the true names of the defendants John Doe and Richard Roe are not known to plaintiff, and when ascertained plaintiff prays that the true names of said defendants may be substituted for the names John Doe and Richard Roe, which are fictitious names.

That ever since the 25th day of November, 1873, this plaintiff and its grantors have been the owners in fee and in the actual, exclusive, notorious and adverse possession of that certain mine and mining ground commonly known as the "Summit Quartz Mine," situate in Sutter Creek Mining District, in the County of Amador, State of California, and bounded and described as follows, with magnetic variations 16° 58′ East:

Beginning at a post marked "42" and "48" situate on boundary between the Amador Quartz Mine and the Summit Quartz
15 Mine; thence north 79° 35′ east 4 chains and 68 links to a post marked "42" and "48;" thence south 27° 15′ east 15 chains and 76 links to a post marked "48;" thence south 52° 56′ west 2 chains and 41 links to a post marked "48," from which the corner common to Sections 7, 8, 17 and 18 in Township 6 North of Range 11 East of Mt. Diablo Base and Meridian bears south 67° 49′ west at the distance of 12 chains and 65 links, 8 chains and 83 links to post marked "48" at the southwesterly corner of the claim; thence north 27° 15′ west 19 chains and 90 links to a post marked "42" and "48;" thence north 79° 35′ east 4 chains and 41 links to the place of begin-

ning, containing 15.50 acres, and embracing 1165.56 linear feet of the Summit Quartz Lode or Vein.

That on the 25th day of November, 1873, the United States of America, by its letters patent, granted to one Hall McAllister all said Summit Quartz Mine hereinabove described, with the exclusive right of possession and enjoyment of all the land included within the exterior lines as above described, and of 1165.56 linear feet of the said Summit Quartz Mine, vein, ledge, lode, or deposit, for such length throughout its entire depth, although it enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior
16 boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey. Said patent was issued in pursuance of and in conformity with the Revised Statutes of the United States, Title 32, Chapter 6. That the said patent to the said Hall McAllister was issued to him by the United States upon application made by him on the 7th day of February, 1871. Said application of the said Hall McAllister was based upon two locations of the said Summit Quartz Mine, one made on the 26th day of March, 1863, for the northerly 780 feet of said lode, and the other made June 22, 1865, for the remainder of said lode or ledge.

That by mesne conveyances the said Hall McAllister, at the time of his said application for said patent and the issuance to him thereof, had become possessed of all the rights of said original locators in and to said Summit Quartz Mine. By mesne conveyances from the said Hall McAllister this plaintiff acquired all the right, title and interest owned and possessed by the said Hall McAllister at any time in and to said mining property known as the "Summit Quartz Mine." By virtue of said mesne conveyances from the said Hall McAllis-
17 ter this plaintiff, on the 5th day of June, 1896, was, ever since has been, and now is, the owner and in the sole, exclusive and adverse possession of said Summit Quartz Mine, and all the lodes, veins, or ledges having their tops or apices within the vertical planes drawn through the surface boundaries of said mine.

That the defendants are, and for several months last past have been, the owners of a tract of land next adjoining the said Summit Quartz Mine on the east, and being the premises commonly known as the "Toman Ranch." Said defendants' title to said premises known as the "Toman Ranch" is derived from two patents issued by the Government of the United States to the predecessor in interest of the defendants. One patent was issued December 1st, 1876, and the other August 20th, 1878, and both were made under the laws of the United States providing for the sale and disposition of what is known as "agricultural lands." Both said patents contained a limitation upon the estate granted by the United States, giving the right to

"the proprietor of a vein or ledge to extract and remove his ore "therefrom should the same be found to penetrate or intersect the "premises hereby granted."

Attached hereto is a diagram, marked "Exhibit A" and which is hereby referred to and made a part of this complaint, upon
18 which is correctly delineated: 1. The exterior boundaries of said Summit Quartz Mine as patented. 2. The exterior boundaries of the premises belonging to the defendant and marked on said "Exhibit A" as "Toman Ranch." 3. The course of the apex of the Summit vein through said Summit Quartz Mining claim hereinafter referred to. 4. The position of the shaft of the Summit Quartz Mine shown in horizontal projection, and so much of the underground workings extended therefrom as have been surveyed and as are necessary to illustrate and explain the rights of this plaintiff and the unlawful claims made by defendant as hereinafter stated.

That within said "Summit Quartz Mine" is a certain vein, lode and ledge of quartz and rock in place carrying gold and other valuable minerals, which said vein, lode and ledge has its top or apex wholly within the surface lines of said Summit Quartz Mine extended downward vertically and wholly without the boundaries of the said "Toman Ranch." Said vein, lode or ledge traverses said Summit Quartz Mine with a course approximately of north 33° and 67′ west. On its onward course it crosses the line in the foregoing description of the exterior boundaries of said Summit Quartz Mine set forth, having a course north 79° 35′ east, and a length of
19 9.09 chains, and also crosses the line set forth in said description, having a course of south 52° and 56′ west, and a length of 8.83 chains. Said vein, lode, or ledge, on its downward course descends into the earth at an angle approximately of 65° eastwardly and on such downward course passes outside of a plane drawn down vertically through the east side line of said Summit Quartz Mine, and enters the land adjoining, and on said downward course reaches, enters, penetrates, extends into and underlies, the said premises belonging to defendant. Said east side line of said Summit Quartz Mine is the one set forth in the foregoing description of the exterior boundaries of said Summit Quartz Mine as having a course south 27° 15′ east and a length of 15.76 chains.

That ever since the said 22nd day of June, 1865, this plaintiff and its predecessors in title, and grantors, have been, and plaintiff is now, in the exclusive, open, notorious and adverse possession of all said Summit Quartz Mine, including the vein or lode above described, throughout its entire depth to the extent of 1165.56 linear feet longitudinally along its course, with the right to follow the said vein, lode or ledge in its descent or downward course to any depth in the direction of the dip or downward course of said vein, lode or ledge, and since the issuance of said patent on the 25th
20 day of November, 1873, this plaintiff and its grantors have

been the owners in the fee of said Summit Quartz Mine, including said vein, lode or ledge.

That the defendants in this action have no right, title or interest in, or claim to, any part or portion of said vein, lode or ledge hereinbefore described, or of any vein, lode or ledge which has its top or apex within said Summit Quartz Mine, and which in its downward course enters, extends to, penetrates, or underlies the premises known as the "Toman Ranch" and belonging to defendants.

That long prior to the acquisition of title from the United States by the defendants and their grantors to the lands and premises known as the "Toman Ranch," the title to said veins, lodes and ledges having apices in the said Summit Quartz Mine and extending into and underlying the surface of said premises known as the "Toman Ranch," had been and was severed from the title to said surface and had been granted and conveyed by the United States, as aforesaid, to the grantors of this plaintiff under and in pursuance of the laws of the United States regulating the sale and disposal of mineral lands of the public domain. That such ownership, possession, or right of possession as said defendants may have, or their grantors may have had, in and to the premises known as the
21 "Toman Ranch," and to each and every portion thereof, are, and at all times were, subject to the rights and interests of this plaintiff in and to said veins, lodes and ledges as in this complaint set forth.

That within said Summit Quartz Mine, and upon the said ledge having its top or apex therein, to-wit: said Summit Ledge or Vein, plaintiff has sunk an incline shaft, and extended the same to the present depth of 1800 feet, or thereabouts, and underneath the exterior boundaries of the said Toman Ranch, and by means of said shaft, and of drifts, levels, and stopes extended therefrom, has heretofore been and now is engaged in extracting and removing from said ledge hereinabove described, and having its top or apex within said Summit Quartz Mine as above set out, the ore and the mineral bearing rock in place therein. That all the ore, mineral deposits, lodes or ledges heretofore or now cut, exposed, opened, worked or appropriated by any of said underground works of plaintiff, or by plaintiff in the course of such working and mining underneath the premises described as the "Toman Ranch," are parts of such ledge having its top or apex wholly within the boundaries of said Summit Quartz Mine, and were and are the properties of this plaintiff; and neither the defendants, nor anyone else from whom they
22 claim title, ever owned or held any interest therein whatever.

That said ledge or vein, having its top or apex, as aforesaid, within the boundaries of the Summit Quartz Mine, contains mineralized ore of great value, and the sole business of this plaintiff is the working of said vein and extracting therefrom the gold and other valuable minerals therein contained.

That the defendants herein claim, by reason of their ownership

of the said "Toman Ranch," to be the owners of all said vein, lode or ledge east of a vertical plane extending downward from the surface boundary line of the said Summit Quartz Mine and of the said land of the defendants, and give out and declare that they are entitled to all of the ore extracted from said mine within the boundaries of the said "Toman Ranch," and deny the right of this plaintiff to extract the ore from said lode or ledge. That said claims of defendants have worked great damage to this plaintiff and have depreciated the market value of said mine. That the said defendants assert that James Toman and Eliza A Toman have assigned to the defendant The East Central Eureka Mining Company, all rights of action possessed by the said Tomans for and on account of the ores extracted by this plaintiff from said lode or ledge within the
23 exterior boundaries of the said Toman Ranch, and the said The East Central Eureka Mining Company has brought an action to recover from this plaintiff the sum of $165,000, the alleged value of said ore extracted by this plaintiff from the said ledge within the exterior boundaries of said Toman Ranch, and defendants threaten, and will, as plaintiff is informed and believes, from time to time bring other actions against this plaintiff for the value of ores extracted from said ledge subsequent to the bringing of said suit by The East Central Eureka Mining Company as aforesaid.

That it is the intention of defendants, as plaintiff is informed and believes, to continually set up claims to said vein, lode or ledge, and from time to time to bring suits to enforce the same, and harrass and annoy this plaintiff and its stockholders, and by so doing compel this plaintiff to buy its peace by paying to the defendants a large sum of money.

That this plaintiff cannot obtain adequate or sufficient relief for the injuries inflicted and threatened by the defendants in any other way than by the judgment of a court of equity enjoining the defendants from setting up any right, title or interest in or to said vein, lode or ledge, or any part thereof.

Wherefore plaintiff prays judgment that it be adjudged and decreed that the defendants have not, nor has any or either of
24 them, any right, title, interest or claim in or to any portion of any vein, lode or ledge having its apex within the surface lines of the Summit Quartz Mine and extended downward into the "Toman Ranch" and underneath the surface thereof. That the defendants by the judgment of this Court be forever enjoined and debarred from asserting any claim to said vein, lode or ledge in this complaint specifically described, and now being worked by this plaintiff, in any part of its downward course, and forbidden and enjoined from interfering with this plaintiff in extracting the ore in said vein, lode or ledge, so long as the same is done in a workmanlike, careful and proper manner and without unnecessary injury to the adjoining territory, and be enjoined and forbidden to assert any claim to the ore extracted from said vein, lode or ledge, or from asserting any claim to the proceeds of any ore taken from said vein, lode or ledge.

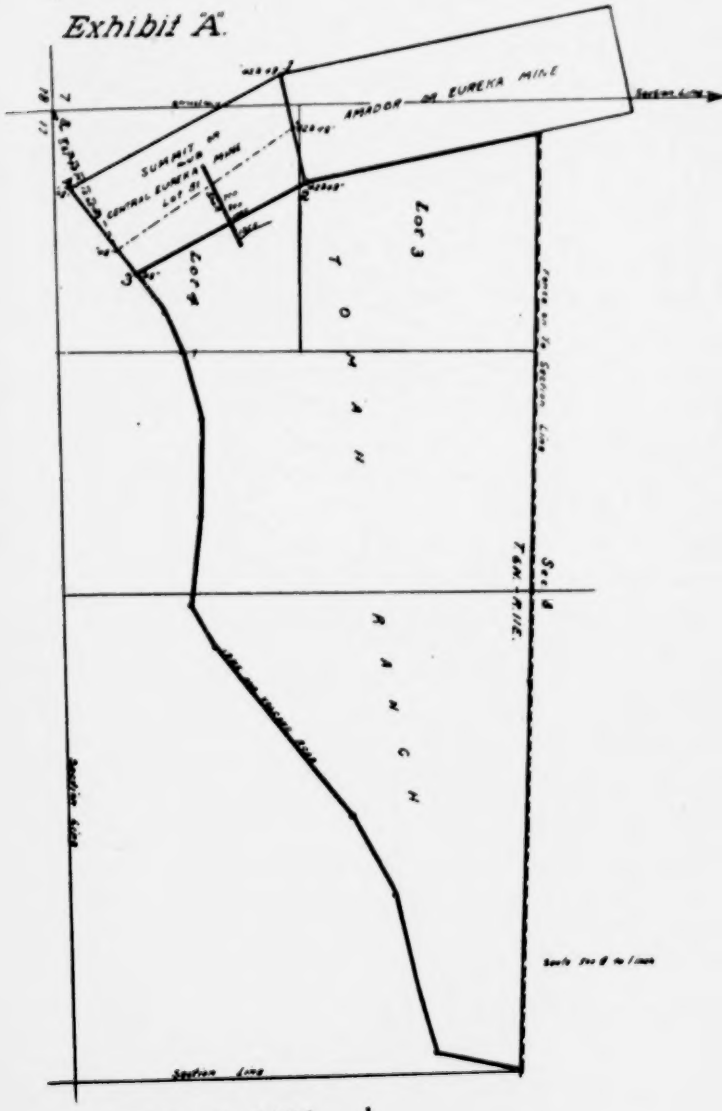
And plaintiff prays that it may have such other, further or different relief as it is entitled to in equity, and its costs of suit.

OLNEY & OLNEY,
Attorneys for Plaintiff.
W. J. McGEE,
Of Counsel.

(Duly verified.)

[Endorsed:] Filed April 8, 1901. C. L. Culbert, clerk.

(Here follows diagram marked p. 25.)


Exhibit "A"
AMADOR OR EUREKA MINE
SUMMIT OR CENTRAL EUREKA MINE
LOT 3
LOT 4
TOWNSHIP
RANGE
Section Line
Section Line
Section Line

26 & 27 [Title of Court and Cause.]

Demurrer of James and Eliza A. Toman.

Come now James Toman and Eliza A. Toman, defendants above named, and demur to the complaint of plaintiff above named now on file in the above entitled action, and as grounds of demurrer aver:

That said complaint does not state facts sufficient to constitute a cause of action against said defendants.

Wherefore, said defendants pray to be hence dismissed with judgment for their costs.

CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendants James Toman and Eliza A. Toman.

[Endorsed:] Due service of within demurrer admitted this 24 day of May, 1901. Olney & Olney, attorneys for —. Filed June 1st, 1901. C. L. Culbert, clerk.

28 [Title of Court and Cause.]

Order Overruling Demurrer.

The demurrer of the defendant, East Central Eureka Mining Company, a corporation, and the demurrer of the defendants James Toman and Eliza A. Toman to the plaintiff's complaint on file in the above entitled action having been heretofore argued upon briefs and submitted to the Court for decision, and the Court having carefully considered the same and being fully advised in the premises:

It is ordered that the said demurrers be and each of them are hereby overruled;

It is further ordered that the said defendants and each of them are hereby given fifteen days to file their respective answers herein.

R. C. RUST, *Judge.*

[Endorsed:] Filed July 10, 1901. C. L. Culbert, clerk.

[Title of Court and Cause.]

Amended Answer of James Toman and Eliza A. Toman.

29 The defendants James Toman and Eliza A Toman, by leave of court first had and obtained, file this, their amended answer to the complaint of plaintiff:

Admit that on the 25th day of November, 1873, the United States

of America, by its letters patent, granted to one Hall McAllister all the Summit Quartz Mine described in the complaint, with the exclusive right of possession and enjoyment of all the land included within the exterior lines thereof, as in the complaint described, and of 1165.56 lineal feet of the said Summit Quartz Mine, together with the veins, ledges, lodes or deposits throughout their entire depth within the said exterior lines of the said Summit Quartz Mine. But these defendants deny that the United States by the said letters patent, or any letters patent, or in any manner whatsoever, granted to the said Hall McAllister the exclusive or any right of possession or enjoyment of any vein, lode, ledge or deposit beyond the said exterior lines of the said Summit Quartz Mine, or that the said letters patent or any letters patent granted to the said Hall McAllister the right to enter into the lands adjoining the said Summit Quartz Mine in any manner whatsoever.

Admit that by the said letters patent set forth in the complaint the United States of America did grant to the said Hall McAllister all the veins, lodes, ledges or deposits throughout their entire depth,
30 the tops or apices of which lie inside of the exterior boundary lines of the said survey described in the complaint at the surface extended downward vertically within the said exterior boundary lines of the said Summit Quartz Mine. But these defendants deny that by the said letters patent or any letters patent the United States of America granted the right to the said Hall McAllister to follow the said veins, lodes, ledges or deposits in their downward course when they so far departed from a perpendicular course as to extend outside the vertical side lines of the said survey, or the said exterior lines of the said Summit Quartz Mine.

Deny that the said patent to the said Hall McAllister was issued to him by the United States upon the application made by him on the 7th day of February, 1871, or upon any other day prior to the — day of October, 1872.

Deny that the said or any application of the said Hall McAllister was based upon two locations, or any locations of the said Summit Quartz Mine, or upon one made upon the 26th day of March, 1863, or at any other date for the northerly 780 feet of the said lode, or any other number of feet of said lode, or upon another location made June 22nd, 1865, or at any other date for the remainder of the said lode or ledge, or any part thereof.

31 Deny that by mesne conveyances, or any conveyances, the said Hall McAllister at the time of his said application for his said patent, or at any other time before the issuance to him of the said patent, had become possessed of all the rights, or any of the rights of the original locators in and to the said Summit Quartz Mine. But these defendants admit that at the time of the issuance of the said patent to the said Hall McAllister, the said Hall McAllister had become possessed of all the rights of every person whatsoever in and to the mining ground described within the said exterior boundaries of the said Summit Quartz Mine; and allege that the

said Hall McAllister was not then, nor did he ever have any rights in or to any of the surrounding lands or the right to pursue any vein, ledge or vein of ore beyond the said exterior boundaries of the said Summit Quartz Mine.

Deny that by virtue of mesne conveyances, or any conveyances, from the said Hall McAllister, or from any conveyance whatsoever the plaintiff on the 5th day of June, 1896, was or ever since has been, or now is, or ever was the owner or in the sole or exclusive or adverse possession of all or any of the lodes, veins or ledges having their tops or apices within the vertical plane drawn through the surface boundaries of the said mine beyond the said exterior boundaries
32 of the same.

Deny that any vein, lode or ledge having its top or apex wholly within the said exterior boundaries of the said Summit Quartz Mine extends downward in its course beyond the easterly side line of the said Summit Quartz Mine or into the premises, or that it underlies the premises belonging to these defendants, or either of them.

Deny that ever since the 22nd day of June, 1865, or since any other date or time the plaintiff or its predecessors in title, or grantors, have been, or that plaintiff is now, or ever was, in the exclusive, or open, or notorious, or adverse possession of all or any vein or lode described in the complaint, throughout its entire depth, or with the right to follow the said vein or lode or ledge in its descent or downward course to any depth in the direction of the dip or downward course of the said vein or lode or ledge. And deny that since the issuance of the said patent on the 25th day of November, 1873, the plaintiff or its grantors have been, or that the plaintiff is now the owner in fee of any vein, or lode or ledge under or beneath the surface of the lands and premises described in the complaint as the Toman Ranch.

Deny that the defendants have no right or title or interest in or claim to any portion of the veins, lodes or ledges described in
33 the complaint, or of any vein or lode or ledge which has its top or apex within the said Summit Quartz Mine, which in its downward course enters or extends to or penetrates or underlies the premises known as the Toman Ranch and belonging to these defendants. But allege that the defendants are the owners and entitled to the possession of all veins, lodes and ledges beneath the surface of the lands and premises described in the complaint as the Toman Ranch.

Deny that at any time or at all the title to the veins, lodes or ledges, or any of them having apices in the said Summit Quartz Mine and extending into or underlying the surface of the said Toman Ranch had been or was severed from the title to the surface of said Toman Ranch, or had been granted or conveyed by the United States as in the complaint alleged or at all to the grantors of the plaintiff under or in pursuance of the laws of the United States regulating the sale

or disposal of the mineral lands of the public domain, or in any manner whatsoever.

Deny that any ownership or possession or right of possession of the defendants, or either of them, or of their grantors, in or to the premises known as the Toman Ranch, or to any portion thereof is or at any time was subject to the rights or interests of the plain-
34 tiff in or to the veins or lodes or ledges as in the complaint set forth, or in any manner whatsoever.

Deny that the parts or portions of ledges underneath the said Toman Ranch have their tops or apices wholly or at all within the said exterior boundaries of the said Summit Quartz Mine alleged and set forth in plaintiff's complaint.

Deny that any lodes or ledges beyond the said exterior boundary lines of the said Summit Quartz Mine or any part thereof are properties of the plaintiff; and deny that neither the defendants nor anyone else from whom they claim title ever owned or held any interest therein whatsoever; but on the contrary, the defendants allege that they are now and for more than ten years last past have been the owners of all the veins, lodes and ledges described in the complaint, which said lodes or ledges are underneath the surface of and within the exterior boundaries of the said Toman Ranch.

Deny that it is the intention or purpose of the defendants to harass or annoy the plaintiff or its stockholders in any manner whatsoever, or to compel the plaintiff to buy its peace by paying to the defendants a large sum of money; but on the contrary the defendants allege that it is the purpose of the defendants to recover from the plaintiff and the stockholders thereof any and all damages
35 suffered by the defendants by reason of any act of the plaintiff in removing from the land and premises any ore or mineral matter belonging to the defendants.

And for a further and separate defense these defendants allege as follows:

That heretofore, to wit: on the 31st day of December, 1898, the plaintiff executed and delivered to the defendants, Eliza A. Toman and James Toman, for a valuable consideration its certain indenture in writing, wherein and whereby the plaintiff remised, released and forever quitclaimed unto the said Eliza A. Toman and James Toman, their heirs and assigns forever, all its estate, right, title, interest, property, possession, claim and demand whatsoever, both at law and in equity, in and to all the land and premises described in the complaint as the Toman Ranch, which said indenture was in the words and figures following, to-wit:

"This Indenture, Made this 31st day of December, A. D. One Thousand Eight Hundred and Ninety-eight, between the Central Eureka Mining Company, (A Corporation) the party of the first part, and Eliza A. Toman and James Toman, her husband, of the County of Amandor, State of California, the parties of the second part,

"Witnesseth: That the said party of the first part, for
36 and in consideration of the sum of Ten Dollars, gold coin of the United States of America, to it in hand paid by the parties of the second part at or before the ensealing of these presents the receipt whereof is hereby acknowledged, has remised, released, and forever quitclaimed, and by these presents does remise, release and forever quitclaim unto the said parties of the second part, and to their heirs and assigns forever,

"All those certain lots, pieces or parcels of land situate, lying and being in the said County of Amador, State of California, and bounded and particularly described as follows, to-wit:

"First. That portion of Section- Eight (8) and Seventeen (17) Township Six (6) North, Range Eleven (11) East, Mount Diablo Base and Meridian, lying North of the center of that certain wagon road extending between the town of Ione and Volcano, and known as the Ione and Volcano wagon road, and lying East of that certain patented mining ground known as the Summit Quartz Mine, and also East of that certain patented mining ground known as the Amador Consolidated Mine.

"Second. Commencing at the southwest corner of that certain patented claim known as the Summit Quartz Mine, situated in Township Six (6) North Range Eleven (11) East, Mount Diablo
37 Meridian, in the County of Amador, State of California, said Southwest corner being at or near the middle of that certain wagon road known as the Ione and Volcano wagon road, thence running in a Southwesterly direction along the center of said Ione and Volcano wagon road a distance of eight and one-half chains more or less to the intersection of the section line between Sections Seventeen (17) and Eighteen (18) in said township, thence Northerly along said section line extended a distance of eighteen and one-half chains more or less, to its intersection with the western boundary line of said Summit Quartz Mine, thence South along said boundary line, twenty-seven degrees, fifteen minutes East, fifteen chains more or less to the point of beginning; being a fractional portion of Lot Four (4) in S. W. one-quarter of said Section Eight (8) and a fractional portion of the Northwest one-quarter of the N. W. one-quarter of Section Seventeen (17) all of the land above described lying Westerly of said Summit Quartz Mine and Northerly of the middle of said Ione and Volcano Road.

"And does hereby remise and release unto the parties of the second part all claims and obligations, bonds, and contracts, or assignments of either made by Eliza A. Toman or James Toman to the said Central Eureka Mining Company, a corporation,
38 or to any of its predecessors in interest, grantors or assignors, and does specially remise and quitclaim unto the said Eliza A. Toman and James Toman, and does hereby specially release them and each of them of and from any covenant or agreement contained in that certain agreement made and entered into between Eliza A. Toman and James Toman, and the Central Eureka Mining Com-

pany, a corporation, under date of October 23rd, 1897, which said agreement was recorded on this 1st day of December, 1897, in Volume G of Agreement- at page 211 *et seq.*, Amador County Records, State of California.

"Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances.

"To have and to hold, all and singular, the above mentioned and described premises, together with the appurtances unto the
39 said parties of the second part, their heirs and assigns forever.

"This deed is made pursuant to the authority and resolution of the Board of Directors of party of the first part, which resolution was adopted by said party of the first part at a meeting thereof, held December 31st, 1898.

"In witness whereof, the said party of the first part has hereunto set its hand and seal the day and year first above written.

"THE CENTRAL EUREKA MINING COMPANY,
"By Z. T. GILPIN, *President.*
"By W. A. M. VAN BOKKELEN, *Secretary.*

"Signed, sealed and delivered in the presence of
"J. B. RICHARDSON.
[CORPORATE SEAL.]

"STATE OF CALIFORNIA, *County of Alameda, ss:*

"On the 25th day of March in the year of our Lord one thousand eight hundred and ninety-nine before me, J. B. Richardson, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Z. T. Galpin, known to me to be the President and W. A. M. Van Bokkelen, known to me to be the Secretary of the Corporation that executed the
40 within instrument, and acknowledged to me that such corporation executed the same.

"In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[SEAL.] J. B. RICHARDSON,
Notary Public in and for Alameda Co., Cal."

That after the said indenture was duly executed by the plaintiff, the said deed or indenture was duly and regularly ratified and assented to by the holders of more than two-thirds of the capital stock of the plaintiff then outstanding.

Wherefore, these defendants pray judgment for their costs.

CAMPBELL, METSON & CAMPBELL,

(Duly verified.)

Attorneys for Defendants.

[Endorsed:] Filed October 17th, 1901. C. L. Culbert, clerk. By B. R. Bruse, deputy clerk.

[Title of Court and Cause.]

Decision of the Court.

The above entitled action came on regularly for trial in its order on the 14th day of October, 1901, before the Court sitting
41 without a jury, a jury having been waived by the respective parties. Messrs. Olney & Olney appeared as attorneys and Messrs. Curtis H. Lindley and W. J. McGee as counsel for plaintiff. A. E. Bolton, Esq., and Charles W. Slack, Esq., appeared for the defendants. The action was then dismissed as to the defendants John Doe and Richard Roe. Thereupon evidence oral and documentary was offered by the respective parties and received in evidence and the cause submitted to the Court for decision. And the Court having duly considered the evidence and the law and the facts renders its decision as follows:

Findings of Fact.

Ever since the 25th day of November, 1873, the plaintiff and its grantors have been the owners in fee and in the actual, exclusive, notorious and adverse possession of that certain mine and mining ground commonly known as the "Summit Quartz Mine," situate in Sutter Creek Mining District, in the County of Amador, State of California, and bounded and described as follows, with magnetic variation 16 degrees and 58′ East:—

Beginning at a post marked "42" and "48" situate on boundary between the Amador Quartz Mine and the Summit Quartz
42 Mine; thence North 79 degrees 35′ East 4 chains and 68 links to a post marked "42" and "48;" thence South 27 degrees 15′ East 15 chains and 76 links to a post marked "48;" thence South 52 degrees 56′ West 2 chains and 41 links to a post marked "48" from which the corner common to Sections 7, 8, 17 and 18 in Township 6 North of Range 11 East of Mt. Diablo Base and Meridian bears South 67 degrees 49′ West at the distance of 12 chains and 65 links, 8 chains and 83 links to post marked "48" at the Southwesterly corner of the claim; thence North 27 degrees 15′ West 19 chains and 90 links to a post marked "42" and "48;" thence North 79 degrees 35′ East 4 chains and 41 links to the place of beginning.

containing 15.50 acres, and embracing 1165.56 linear feet of the Summit Quartz Lode or Vein.

On the 25th day of November, 1873, the United States of America, by its letters patent, granted to one Hall McAllister all said Summit Quartz Mine hereinabove described, with the exclusive right of possession and enjoyment of all the land included within the interior lines as above described, and of 1165.56 linear feet of the Summit Quartz Mine, vein, ledge, lode or deposit, for such length throughout its entire depth, although it enters the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire
43 depth the tops or apices of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from the perpendicular as to extend outside the vertical side lines of said survey, but limiting the right of possession to such outside parts of said veins or ledges within such portions thereof as lie between vertical planes drawn downward through the end lines of above described premises continued in their own direction.

Said patent was issued in pursuance of and in conformity with the Revised Statutes of the United States, Title 32, Chapter 6, and was issued to the said Hall McAllister upon application made by him on the 7th day of February, 1871. The said application of the said Hall McAllister was based upon two locations of the Summit Quartz Mine, one made on the 26th day of March, 1863, for the northerly 780 feet of said lode, vein, or ledge, and the other made June 22nd, 1865, for the remainder of said vein, lode, or ledge.

The said Hall McAllister, by mesne conveyances, had become possessed at the time of said application for said patent and at the time of the issuance of said patent to him, of all the rights of said
44 original locators in and to said Summit Quartz Mine. By mesne conveyances from the said Hall McAllister the plaintiff herein acquired all the right, title and interest owned or possessed by the said Hall McAllister at any time in and to said mining property known as the "Summit Quartz Mine."

The defendants are, and at the time of bringing this suit were, and for some time prior thereto had been, the owners of a tract of land next adjoining the said Summit Quartz Mine on the east, and being the premises commonly known as the "Toman Ranch." The title of the defendants to the premises known as the "Toman Ranch" is derived from two patents issued by the Government of the United States to the predecessors in interest of the defendants. One patent was issued December 1st, 1876, and the other August 20th, 1878, and both were made under the laws of the United States providing for the sale and disposition of what is known as "agricultural lands." Both said patents contained a limitation upon the estate granted by the United States, giving the right to the proprietor "of a vein or ledge to " extract and remove his ore therefrom should the same be found to " penetrate or intersect the premises hereby granted."

Attached hereto is a diagram, marked "Exhibit A," which
45 is hereby referred to and made a part of this decision. Upon this diagram is correctly delineated. 1. The exterior boundaries of said Summit Quartz Mine as patented. 2. The exterior boundaries of the premises belonging to the defendants and marked on said "Exhibit A" as "Toman Ranch." 3. The course of the apex of the Summit vein through said Summit Quartz Mining claim hereinafter referred to. 4. The position of the shaft of the Summit Quartz Mine shown in horizontal projection, and so much of the underground workings extended therefrom as had been at the time of the institution of this suit surveyed, and as are necessary to illustrate and explain the rights of the parties hereto.

Within the said "Summit Quartz Mine" is a certain vein, lode and ledge of quartz and rock in place carrying gold and other valuable minerals, which said vein, lode and ledge has its top or apex wholly within the surface lines of said Summit Quartz Mine extended downward vertically. Said vein, lode or ledge traverses said Summit Quartz Mine with a course approximately of north 33 degrees and 67′ west. In its course it crosses both the northern and southerly end lines of said mining ground above described. On the north it crosses the end line at a point marked on the diagram, "Exhibit A"
46 as "42 and 48," and being the beginning point of the description hereinabove set out. It crosses the southern end line at a point marked on the diagram "Exhibit A" as "48" and being two chains and 41 links from southeast corner of said patented mining ground. Said vein, lode or ledge in its downward course descends into the earth at an angle approximately of 65 degrees eastwardly and on such downward course passes outside of a plane drawn down vertically through the east side line of said Summit Quartz Mine, and enters the land adjoining at a depth of 1094 feet from the collar of the shaft. On said downward course, and at said depth, it reaches, enters, penetrates, and extends into and underlies the premises known as the "Toman Ranch"

Ever since the said 22nd day of June, 1865, the plaintiff and its predecessors in title, and grantors, have been, and plaintiff was at the beginning of this suit, and now is, in the exclusive, open, notorious and adverse possession of all said Summit Quartz Mine, including the vein, lode or ledge above described, throughout its entire depth to the extent of 1165.56 linear feet longitudinally along its course, with the right to follow the said vein, lode or ledge in its descent or downward course to any depth in the direction of the dip or downward course of said vein, lode or ledge, and since the issuance of said pat-
47 ent on the 25th day of November, 1873, this plaintiff and its grantors have been the owners in fee of said Summit Quartz Mine, including said vein, lode or ledge.

That the defendants in this action have no right, title or interest in, or claim to, any part or portion of said vein, lode or ledge hereinbefore described, or of any vein or lode or ledge which has its top or apex within said Summit Quartz Mine, and which in its downward

course enters, extends into, penetrates, or underlies the premises known as the "Toman Ranch" and described in the complaint herein.

Prior to the acquisition of title from the United States by the defendants and their grantors to the land and premises known as the "Toman Ranch" the title to said veins, lodes and ledges having apices in the said Summit Quartz Mine and extending into and underlying the surface of said premises known as the "Toman Ranch," had been and was severed from the title to said surface and had been granted and conveyed by the United States as aforesaid to the grantors of plaintiff under and in pursuance of the laws of the United States regulating the sale and disposal of mineral lands of the public domain. The ownership, possession, or right of possession, of defendants and their grantors, in and to the premises
48 known as the "Toman Ranch" and to each and every portion thereof, are and at all times were subject to the rights and interests of this plaintiff in and to said veins, lodes or ledges hereinbefore described.

Within said Summit Quartz Mine and upon the said ledge having its top or apex therein, to-wit: said Summit ledge, lode or vein, the plaintiff has sunk an incline shaft and extended the same to the depth at the present time of two thousand feet or thereabouts, and underneath the exterior boundaries of the said "Toman Ranch," and by means of said shaft and of drifts, levels and stopes extended therefrom has heretofore been, and at the time of the commencement of this action was, and now is, engaged in extracting and removing from said ledge hereinabove described and having its top or apex within said Summit Quartz Mine, as above set forth, the ore and the mineral bearing rock in place therein. All the ore, mineral deposits, lodes, veins or ledges heretofore or now cut, exposed, open, worked or appropriated by means of said underground works of plaintiff, or by plaintiff in the course of such working and mining underneath the premises described as the "Toman Ranch," are parts of such ledge having its top or apex wholly within the boundaries of said Summit Quartz Mine and within the end lines of said
49 mine projected in their own direction, and were and are the properties of the plaintiff, and neither the defendants, nor anyone else from whom they claim title, ever owned or held any interest therein whatsoever. Said lode, ledge or vein, having its top or apex as aforesaid within the boundaries of the Summit Quartz Mine, contains mineralized ore of great value and the sole business of said plaintiff is the working of said vein and extracting therefrom the gold and other valuable minerals therein contained.

The deed dated December 31st, 1898, and set out in *haec verba* in the respective answers of the defendants herein, does not include any portion of the said mines described in the Letters Patent from the United States to Hall McAllister hereinabove referred to, nor does it include any vein, lode or ledge having its apex within the

exterior boundaries of the said mines as described in said patent and hereinbefore described.

All the denials contained in said answers of the defendants, and each of them, are untrue.

Conclusions of Law.

From the foregoing facts the plaintiff is entitled to judgment in accordance with the prayer of its complaint. Let a judgment and decree be entered accordingly in favor of plaintiff in ac-
50 cordance with the prayer of its complaint, and for costs of suit.

Dated November 6th, 1901.

R. C. RUST,
Judge of the Superior Court.

[Endorsed:] Filed Nov. 6, 1901. C. L. Culbert, clerk.

[Title of Court and Cause.]

Judgment.

This cause came on regularly for trial on the 14th day of October, 1901, Olney & Olney appearing as attorneys for the plaintiff and Curtis H. Lindley and W. J. McGee as its counsel. Judge Charles W. Slack and A. E. Bolton, Esq., appeared for the defendants. A trial by jury having been expressly waived by the respective parties the cause was tried before the Court without a jury. Whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined and documentary evidence introduced by the respective parties, and the evidence being closed the case was submitted to the Court for consideration and decision, and after due consideration thereon the Court files its findings and decision in writing
51 and orders that judgment be entered herein in favor of the plaintiff in accordance with the prayer of its complaint.

Wherefore, by reason of the law and the decision aforesaid, it is ordered, adjudged and decreed that the plaintiff is, and at the beginning of this action was, the owner and in the possession of that certain mine and mining ground commonly known as the "Summit Quartz Mine," situate in Sutter Creek Mining District, in the County of Amador, State of California, and described as follows, with magnetic variations 16 degrees and 58′ East.

Beginning at a post marked "42" and "48" situate on boundary between the Amador Quartz Mine and the Summit Quartz Mine; thence north 79 degrees 35′ east 4 chains and 68 links to a post marked "42" and "48"; thence south 27 degrees and 15′ east 15 chains and 76 links to a post marked "48"; thence south 52 degrees

56′ west 2 chains and 41 links to a post marked "48" from which the corner common to Sections 7, 8, 17 and 18 in Township 6 North of Range 11 East of Mt. Diablo Base and Meridian bears south 67 degrees 49′ west at the distance of 12 chains and 65 links, 8 chains and 83 links to a post marked "48" at the southwesterly corner of the claim; thence north 27 degrees 15′ west 19 chains and 90 links to a post marked "42" and "48"; thence north 79 degrees 35′
52 east 4 chains and 41 links to the place of beginning, containing 15.50 acres, and embracing 1165.56 linear feet of the Summit Quartz Lode or Vein; together with all veins, lodes and ledges having their apex or apices within the exterior boundaries of said land above described and within the end lines of said premises as above described projected in their own direction through such veins, lodes and ledges in their downward course enter into the land and premises known as the "Toman Ranch" and described and referred to in the complaint herein.

It is further ordered, adjudged and decreed that the defendants have not, nor has any or either of them, any right, title, interest or claim in or to any portion of any vein, lode or ledge having its apex within the surface lines of the Summit Quartz Mine hereinabove described and extending downward into the said "Toman Ranch" and underneath the surface thereof.

It is further ordered, adjudged and decreed that the defendants and each of them, and all persons claiming by, through, or under them, be and they are hereby forever forbid, enjoined and debarred from asserting any claim or interest in any vein, lode or ledge now being worked by the plaintiff and described in the complaint and in the decision herein, in any part of its downward course
53 within the end lines of said mine projected in their own direction, and they and each of them are forbidden and enjoined from interfering with the plaintiff, its servants, agents and employees, in extracting the ore in any of said veins, lodes or ledges so long as the same is done in a workmanlike, careful and proper manner and without unnecessary injury to the adjoining territory; and they are likewise hereby enjoined and forbidden to assert any claim to the ore extracted from any of said veins, lodes or ledges or from asserting any claim to the proceeds of any ore taken from any of said veins, lodes or ledges.

It is further ordered, adjudged and decreed that the plaintiff have and recover its costs against the defendants taxed at the sum of $—

Done in open Court this 6th day of November, 1901.

R. C. RUST,
Judge of the Superior Court.

[Endorsed:] Filed Nov. 6th, 1901. C. L. Culbert, clerk.

Judgment recorded —— —, 1901, in Vol. 3 of Judgments, page 401.

54 [Title of Court and Cause.]

Bill of Exceptions.

Be it Remembered, that the above entitled cause came on for trial on October 14th, 1901; the following proceedings were had and evidence introduced:

Mr. OLNEY: The action is in the nature of an action to quiet title, by setting up the facts involved in the contest as between the two parties. The complainant alleges that the plaintiff is in possession and the owner of a certain mining claim near Sutter Creek in this County, and that the defendant makes certain claims, setting them out, in regard to that property. The Central Eureka Mining Company, it is alleged, and so far as the surface ground is concerned, it is not denied, is the owner and in the possession of this mining claim, commonly known as the "Summit Quartz Mine" and delineated on the map. (Referring to plaintiff's exhibit No. 3.) The line to which I point towards the bottom is the east line of the mine. The plaintiff alleges, and it is admitted by the answer, that the defendants, Toman and wife, are the owners of the ranch adjoining on the east.

It is admitted by the pleadings that the Summit Quartz Mine was conveyed by the United States letters patent to Hall McAllis-
55 ter on the 25th day of November, 1873; that McAllister's patent was issued upon locations made, one in 1863, for a portion, and another location made in 1866, for the balance of the ledge. It is admitted that the plaintiffs deraign title from Hall McAllister to this mining property.

When the patent is introduced in evidence, your Honor will see, as you see from the map (referring to plaintiff's exhibit No. 3) that the end lines are not parallel, and it is contended by the defendant that for that reason the plaintiff has no extra lateral right. The plaintiff in this action, following, as it claims, its vein or ledge in its downward course, crosses its east line about 1100 feet down, and for some two or three years last past, and at the present time, it is working under the defendants' surface lines of the Toman Ranch and inside of its boundaries. Plaintiff alleges that the Toman Ranch was patented long subsequent to the issuance of the patent to Hall McAllister as agricultural lands, and that the rights conveyed by our patent are prior to and ante-date those of the Toman patent, and that plaintiff's patent gives it the right to go in under the Toman land.

The second question, is the vein or lode a continuous vein, and does the plaintiff have the right to follow it?

The third proposition involved is: All the defendants set
56 up that on the 31st day of December, 1898, the plaintiff in this action made a quitclaim deed to James Toman and Eliza A. Toman, by which it remised and released to the Tomans all the land lying east of that certain patented mining claim known as the

Summit Mine, and the defendants claim, as we understand it, that under that deed plaintiff conveyed the ledge and mineral matter that had been conveyed to Hall McAllister by the United States patent, and that the plaintiff had no right since the execution of that deed, to go beyond the eastern side line.

As to whether this vein, lode or ledge, is continuous, having its apex within the surface boundaries of the Summit Mine, is purely a question of fact. The other two questions are questions of law, or possibly, mixed questions of law and fact. That this patented ground has no parallel end lines, whether we still have the right to follow the vein or lode into adjoining ground; and second, whether this quit-claim deed, conveying the interest of the plaintiff in any land east of its mining claim, conveys any interest in the mine itself.

57 Plaintiff then read in evidence the patent to Hall McAllister, in the words and figures following, to-wit:

General Land Office No. 691.

Mineral Certificate No. —.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress, approved July twenty-six, eighteen hundred and sixty-six, entitled, "An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes;" the act amendatory thereof, approved July ninth, eighteen hundred and seventy; and the act approved May 10th, eighteen hundred and seventy-two, entitled "An Act to promote the development of the mining resources of the United States," there have been deposited in the General Land Office of the United States the Plat and Field Notes of survey of the claim of Hall McAllister upon the Summit Quartz Mine, accompanied by the Certificate of the Register of the Land Office at Sacramento, in the State of California, whereby it appears that in pursuance of said acts of Congress Hall McAllister did, on the eleventh day of October, A. D.,

58 1872, enter and pay for said mining claim or premises, being Mineral Entry No. 118, in the series of said Office, designated by the Surveyor General as Lot No. 51 embracing a portion of the south half of Sections seven (7) and eight (8) in Township six (6) north of Range eleven (11) East Mount Diablo Meridian, in the Sutter Creek Mining District in the County of Amador and State of California, in the District of Lands subject to sale at Sacramento, embracing fifteen (15) acres and fifty-one hundredths (51/100) of an acre of land more or less, and according to the returns on file in the General Land Office, bounded, described, and platted as follows, with magnetic variation at sixteen (16) degrees fifty-eight (58) minutes east, to wit:

Beginning at Post marked "42 and 48," situate on boundary between the Amador Quartz Mine and the Summit Quartz Mine; thence

T. 6 N. R. 11 E.
Mount Diablo Meridian
Lot 37-81.
Sec 7.
Sec 8
Sec 18.
Sec 17
Point 4-0
Point 4-0
Point 4-0

north seventy-nine (79) degrees thirty-five (35) minutes east four (4) chains and sixty-eight (68) links to post marked "42 and 48;" thence south twenty-seven (27) degrees fifteen (15) minutes east, fifteen (15) chains and seventy-six (76) links, to post marked "48;" thence south fifty-two (52) degrees fifty-six (56) minutes west two (2) chains and forty-one (41) links to post marked "48" from which the corner common to sections seven (7) eight (8) seventeen
59 (17) and eighteen (18) in Township six (6) north of Range eleven (11) East Mount Diablo Meridian, bears south sixty-seven (67) degrees forty-nine (49) minutes west at the distance of twelve (12) chains and sixty-five (65) links, eight (8) chains and eighty-three (83) links to post marked "48," at the southwesterly corner of the claim; thence north twenty-seven (27) degrees fifteen (15) minutes west nineteen (19) chains and ninety (90) links to post marked "42 and 48;" thence north seventy-nine (79) degrees thirty-five (35) minutes East four (4) chains and forty-one (41) links to the place of beginning, containing fifteen (15) acres and fifty-one hundredths (51/100) of an acre of land more or less as represented by yellow shading in the following plat.

Plat of the claim of Hall McAllister upon the Summit Quartz Mine. Sutter Creek Mining District, Amador County, California. Containing 15 51/100 acres. Scale 5 chs. to 1 inch. Var. 16° 58′ East.

(Here follows diagram marked p. 45.)

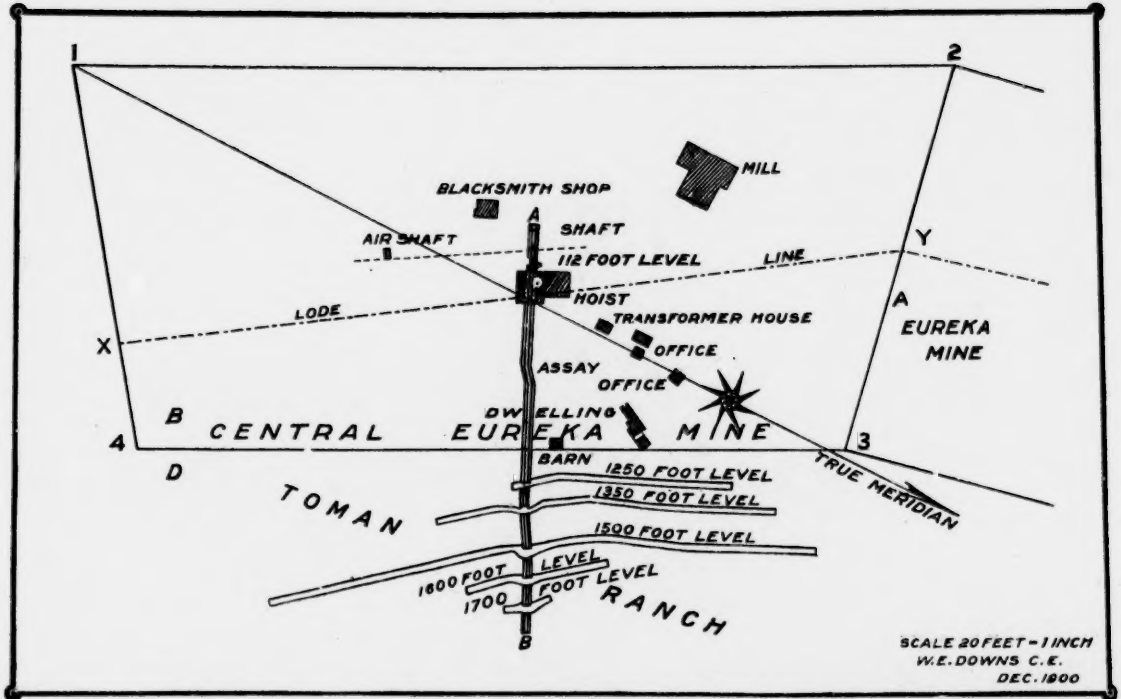
60 Now know ye, that the United States of America, in consideration of the premises, and in conformity with said acts of Congress, have given and granted, and by these presents do give and grant, unto the said Hall McAllister, and to his heirs and assigns, the said mining premises hereinbefore described as Lot No. 51, embracing a portion of the south half of Sections seven (7) and eight (8) in Township six (6) north of Range eleven (11) east, Mount Diablo Meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of eleven hundred and sixty-five, and fifty-six hundredths (1165-56/100) linear feet of the said Summit Quartz Mine vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: Provided, That the right of possession hereby granted to such out-

61 side parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits: And provided further, That nothing in this conveyance shall authorize the grantee herein, his heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another: To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said Hall McAllister and to his heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as Lot No. 51 with eleven hundred and sixty-five and fifty-six hundreths (1165-55/100) linear feet of the Summit Quartz Mine vein, lode, ledge, or deposit for the length aforesaid, throughout its entire depth as aforesaid, together with all other veins, ledges, or deposits throughout their entire depth as aforesaid, the tops or apexes of which lie inside of the exterior lines of said survey, as against all persons claiming under locations made upon such other veins, lodes, ledges, or deposits, subsequent to May 10, 1872, but subject to the right of other parties to follow any vein, or lode, with its dips, angles, and variations, legally held under a location made prior to such date.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course

no. 447
E.C.E. McCord, p. 63
C. & M. C.



49

be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held
62 subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress, the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the twenty-fifth day of November, in the year of our Lord one thou-
[SEAL.] sand eight hundred and seventy-three, and of the independence of the United States the ninety-eighth.

By the President: U. S. GRANT.

By Z. B. STURGUS,
Ass't Secretary.

L. K. LIPPINCOTT,
Recorder of the General Land Office.

Recorded Vol. 8, Pages 131 to 136.
Examined.

[Endorsed:] Central Eureka M. Co. *vs.* East Central Eureka M. Co. Plaintiff's Exhibit No. 1, Filed October 14, 1901, C. L. Culbert, Clerk, By B. R. Breese, Deputy Clerk. Filed and Recorded at the request of F. A. Howard, March 15th, 1887, at 30 min. past 10 o'clock, A. M., in Book A of Mineral Patents of Records of Amador County, Page 153 &c. L. J. Fonteurore, County Recorder, By S. G. Spagnoti, Deputy Recorder.

Plaintiff then offered, for the purpose of explaining the testimony, maps Number 1 of the Summit Mine, Plaintiff's Exhibit 3, as follows:

(Here follows diagram marked p. 63.)

64 Plaintiff offered and read in evidence certified copy of the patent record of the Summit Quartz Mine, in the words and figures following:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C. *June* 21, 1900.

I, Binger Hermann, Commissioner of the General Land Office do hereby certify that the annexed copy, pages 1 to 71 inclusive of papers in Sacramento, California Mineral Entry No. 118, made October 11, 1872, by Hall McAllister for the Summit Quartz Mine, Lot No. 51 is a true and liberal exemplification of said papers on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[SEAL.] BINGER HERMANN,
Commissioner of the General Land Office.

1	Register's Certificate of purchase,	October 11, 1872
1½	Receiver's receipt, final payment,	" 11, 1872
2.	Notice Application H. McAllister for patent,	January 31, 1871
65	3. Register's Certificate of Posting,	February 7, 1871
	4. Diagram posted.	
5.	Papers recd. from Surveyor General,	June 3, 1871
6.	Survey and Field Notes.	
9.	Report Deputy Surveyor,	May 1, 1872
11.	Final Oath of Surveyor & Assistants.	
12.	Register's Certificate. Date of filing papers.	
13.	Approval Survey by Surveyor General,	June 4, 1872
14.	Certificate by Surveyor General,	June 8, 1872
15.	Register's order of Publication,	Feb. 7, 1871
16.	Affidavit of Publication,	July 21, 1871
16.	Order and copy of Notice Published.	
19.	Notice posted on claim.	
20.	Affidavit of continuous posting, Allen Tibbets.	
21.	Affidavit of continuous posting, John A. Eagan.	
22.	Diagram posted.	
23.	Petition for Patent,	Jan. 31, 1871
	27. Affidavit B. Maxey, surface sights,	Apr. 3, 1872
66	28. J. Foot Turner, abandonment of surface,	Mar. 16, 1871
29.	Acknowledgment of above.	
30.	Citation to J. S. Tanner,	Oct. 10, 1871
32.	Citation to H. McAllister in claim of Morgan.	
34.	Citation, Placerville & S. V. R. R. Co.	
36.	Abandonment by F. M. Morgan.	
38.	Abandonment by J. S. Tanner	

40. Register Certificate to U. S. Sur. Gen'l. no adverse claims, etc. October 30, 1871
41. Affidavit A. Tibbets extent of claim and amount of surface.
43. Affidavit Jas. Morgan
44. Affidavit H. McAllister citizenship, work, etc. April 17, 1872.
45. Statement, papers not filed.
Affidavit W. N. Johnson loss of record and customs.
47. Decision of Register and Receiver.
67 48. Letter of Transmittal.

Register's Final Certificate of Entry.

U. S. Land Office at Sacramento, Cal.

OCTOBER 11TH, 1872.

"Toman Ranch," had been and was served from the title to said sur-
Mineral Entry No. 118.

Lot No. 51.

It is hereby certified that, in pursuance of the Mining Act of Congress, approved July 26, 1866, and the Act amendatory thereof, approved July 9, 1870, Hall McAllister whose post office address is.....on this day purchased that mineral claim or lot of land designated as Survey No. 51 in the S. ½ of Sections 7 & 8 in Township No. 6 North of Range 11 East Mt. Diablo Meridian, situate, lying and being in the Sutter Creek Mining District, in the County of Amador and State of California known as the Summit Quartz Mining Claim, embracing one thousand one hundred and seventy-two and 22-100 (1172 22-100) linear feet along the course of the vein or lode with 16 51-100 acres of surface ground, as shown by said survey, for which the said Hall McAllister have this day made payment to the Receiver in full, amounting to the sum of eighty ($80.00) dollars.

Now, therefore, be it known, that upon the presentation of this certificate to the *Commissioner of the General Land Office*, to-
68 gether with the plat, survey, and description of said claim, a *Patent* shall issue thereupon to the said Hall McAllister if all be found regular.

T. B. McFARLAND, *Register.*

[Endorsed:] Register's Final Certificate of Entry. Case of the Summit Quartz Mining Claim of Hall McAllister upon the Summit Quartz Lode, being Lot No. 51 in T. 6 N. of R. 11 E. Sutter Creek Mining District Amador County, California claimed by Hall McAllister.

Receiver's Receipt.

(Duplicate to be given the Purchaser.)

Mineral Entry No. 118.

Lot No. 51.

U. S. Land Office at Sacramento, Cal.

OCTOBER 11TH, 1872.

Received from Hall McAllister by Johnson & Severance attys the sum of Eighty dollars, the same being in full for the surface area embraced by Survey No. 51 in the S. ½ of Section 7 & 8 in Township No. 6, North of Range No. 11, East Mt. Diablo Base & Meridian, said Mineral Claim or lot of land being situate in Sutter Creek Mining District, County of Amador and State of California and known as the Summit Quartz Mining Claim, embracing 15
69 51-100 acres, as shown by said survey.

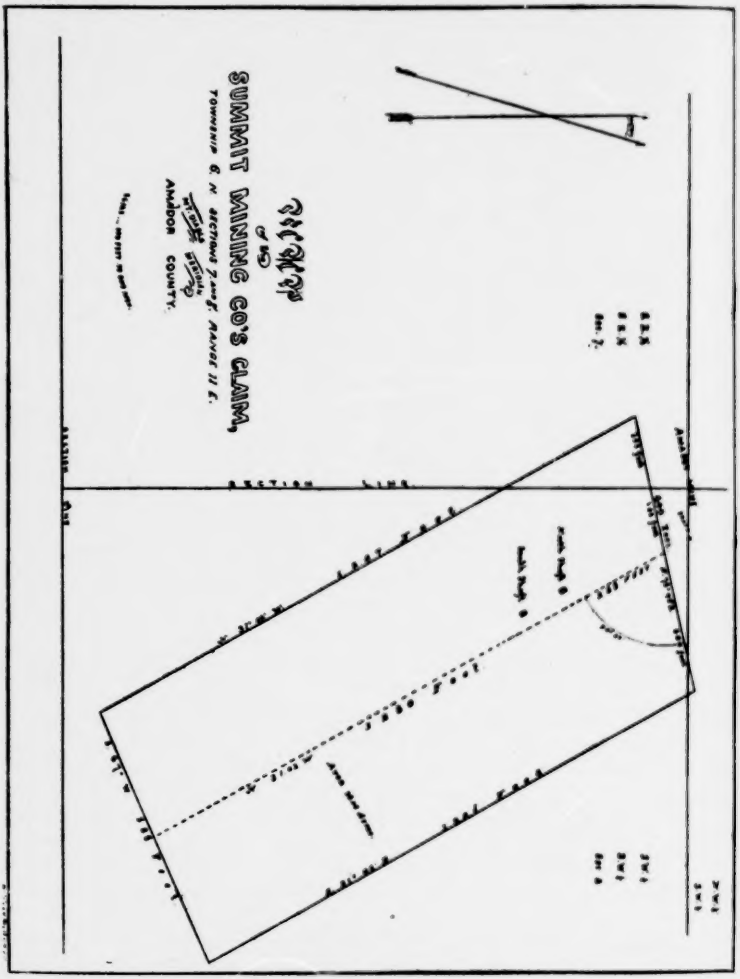
$80.

HART FELLOWS, *Receiver.*

[Endorsed:] Receiver's Receipt. Case of the Summit Quartz Mining Claim, Lot No. 51, in T. 6. N. R. 11 E. in Sutter Creek Mining District Amador County California claimed by Hall McAllister.

Application for a Patent for a Gold Quartz Claim.

Notice is hereby given to whom it may concern, that it is the intention of the undersigned, Hall McAllister, to make immediate application to the Government of the United States for a patent to the following described Quartz Gold Mining Lode Claim, containing gold bearing quartz rock in place, known as the Summit Mining Company's claim, situated, lying and being in Sutter Creek Mining District, County of Amador and State of California, commencing at a post on said lode, to which is attached this notice and a Diagram of said claim, at a point where said claim joins the Amador Mining Company's claim or lode (formerly known as the Hayward Mine) on the North, thence running South 31° 02′ East, on what is known as the Badger or Hayward Lode, twelve hundred and thirty feet, to the center of the Volcano and Ione City Road; Also a sufficient quantity of surface ground on each side of said lode, for the convenient use and working of said mine, to-wit: Three hundred feet in width on each side of said lode or vain, the entire length thereof, more particularly described as follows, to-wit: commencing at the post above mentioned, thence running North 78° 48′ East three



No. 4447.
C.C. & M. Co. vs. } p. 71
C. & M. Co.

hundred feet, to a post; thence South 31° 02′ East twelve hundred and five feet to a post; thence South 67° West five hundred
70 and eighty-five feet to a post; thence North 31° 02′ West, twelve hundred and eighty-seven feet to a post; thence 78° 48′ East Three hundred feet, to the place of beginning, containing 16.05 acres of the surveyed public lands of the United States subject to sale in the Sacramento Land District, California, on the West half of the Southwest quarter of Section eight (8) and the Southeast quarter of the Southeast quarter of Section seven (7) in Township number six (6) North, Range Eleven (11) East, Mount Diablo Base and Meridian, the same embracing the Summit Mining Company's lode or vein, above described.

All persons holding any adverse claim thereto, or any part thereof, are hereby required to present the same before the Register and Receiver of the United States Land Office for Sacramento Land District, at Sacramento, California, within ninety (90) days from the first publication of this Notice.

Posted on said claim January 31st, 1871.

HALL McALLISTER.

JOHNSON & SEVERANCE,
92 J Street Sacramento
Attys. for Applicant.

Posted in U. S. Land Office, Sacramento, Feby. 7th, 1871.

UNITED STATES LAND OFFICE,
SACRAMENTO. CAL., *Oct. 2nd*, 1872,

I hereby certify, That the foregoing notice and diagram in Application for Patent No. 103, were posted in this office on the 7th day of February, 1871, and that the same remained so posted for ninety consecutive days from the date of such posting.

T. B. McFARLAND, *Register.*

[Endorsed:] No. 103—Notice and Diagram Posted in U. S Land Office, Sacramento, Cal.

(Here follows diagram marked p. 71).

72 Recd. with Sur. Genl's letter of June 6, 1872.

FIELD NOTES
of
the Survey of the Summit Quartz Mine,
Claimed by Hall McAllister.
Located in Sutter Mining District, Amador County, California.
Township 6, North Range 11 East Mount Diablo Meridian,
by
William L. McKim U. S. Deputy Surveyor under his Instructions dated January 4th, 1872.
Survey Commenced January 22, 1872.
Survey Completed January 22, 1872.

Preliminary Oath of Assistants.

I, ——— ———, do solemnly swear that I will well and truly perform the duties of Compassman, according to instructions given me, and to the best of my skill and ability.

——— ———.

Subscribed and sworn to before me, this — day of —— 187—.

———— ————,
U. S. Deputy Surveyor.

We, D. D. Reaves and Allen Tibbits do solemnly swear that we will faithfully execute the duties of Chain Carriers that we
73 will level the chain upon uneven ground, and plumb the tally pins, whether by sticking or dropping the same; that we will report the true distance to all notable objects, and the true length of all lines; that we will assist in measuring, to the best of our skill and ability, in the Survey of the Summit Mine a Gold bearing Quartz Vein or Lode of Gold bearing Quartz Rock in the Sutter Mining District.

D. D. REAVES
ALLEN TIBBITS.

Subscribed and sworn to before me, this 22nd day of January, 1872.

WILLIAM L. McKIM,
U. S. Deputy Surveyor.

I, —— —— do solemnly swear that I will well and truly perform the duties of —— according to instructions given me, and to the best of my skill and ability.

—— ——

Subscribed and sworn to before me, this — day of —— 187—

—— ——
U. S. Deputy Surveyor.

Field Notes.

Of the final survey of the Mining Claim known as the Summit Quartz Mine claimed by Hall McAllister.

Located in Sutter Mining District, in Amador County,
74 California, Township No. 6 North, Range No. 11 East, Mount Diablo Base and Meridian.

Executed by Wm. L. McKim, U. S. Deputy Mineral Surveyor, under Instructions from J. R. Hardenbergh, U. S. Surveyor-General, dated January 4, 1872.

Survey commenced, January 22, 1872.

Survey completed, January 22, 1872.

Course. Chains. Survey of the line along the supposed general course of the Vein or Lode (no outcrop visible). Beginning at a post marked 48, from which a White Oak, 40in. diam. bears N. 63° 58′ E. 1.76 chs. distant.

A White Oak, 30 in. diam. bears S. 6° 02′ E. 2.89 chains distant.

An old shaft, 4x4 ft. 175 feet deep, bears N. 66° 40′ W. 3.66 chains distant; and

The corner common to Sections 7, 8, 17 and 18, Township 6 North, Range 11 East, Mount Diablo Base and Meridian, bears 67° 49′ W.
75 Var. 16° 58′ E.

12.65 chains distant. Thence Along the supposed general course of the Vein.
N. 36° 67′ W. Var. 16° 58′ E.

1.00 Ravine.

1.50 Road.

12.80 Hoisting Works over Middle Shaft.

Course. Chains.

13.50 Building over North Shaft.

15.72 Road to Amador Quartz Mine.

17.66 To a post marked 42 and 48, being common to the Southern boundary of the line along the Vein or Lode of the Amador Quartz Mine, and the Northern boundary of the line along the supposed general course of the Vein or Lode of the Summit Quartz Mine, from which,

A Pine Tree, 8 in. diam. bears S. 57° 25′ W, 72 chains distant.

Survey of the Exterior Boundaries of the land claimed with the Summit Quartz Mine.
76

Beginning at a post marked 42 and 48, being common to the Southern boundary of the line along the Vein or Lode of the Amador Quartz Mine, and the Northern boundary of the line along the supposed general course of the Vein or

Lode of the Summit Quartz Mine, from which,
A Pine Tree, 8 in. diam. bears S. 57° 25′ W. 72 ch. dist.
Thence,

N. 79° 35′ E. Along the line between the Amador Quartz Mine and the Summit Quartz Mine.
1.70 Road to Amador Quartz Mine
4.68 To post marked 42 and 48.
Thence

S. 27° 15′ E. Var. 16° 58′ E.
15.76 To post marked 48 standing in the Volcano and Ione Road. Thence,

S. 52° 56′ W. Along said road.
Var. 16° 58′ E.
2.41 To post marked 48 and Southern boundary of the line along the Vein or Lode.

77

Course. Chains.
8.63 To post marked 48 from which,
A White Oak, 14 in. diam. bears N. 87° 38′ E. 57 chs. dist.
A Pine, 5 in. diam. bears S. 70° 48′ W. 1.19 chs. distant. Thence,

N. 27° 15′ W. Var. 16 58′ E.
1.25 Ravine.
5.50 Sutter and Volcano Road.
13.00 Road to Amador Quartz Mine.
19.90 To post marked 42 and 48 and common to S. W. corner of land claimed with theAmador Quartz Mine. Thence

N. 79° 35′ E. Along the line between the lands claimed by said Mines.
4.41 To place of beginning.

Containing 15 51/100 acres.

Report.

U. S. Deputy Surveyor's Office.

JACKSON, May 1, 1872.

Hon. J. R. Hardenbergh, U. S. Surveyor General for California.

78 SIR: In compliance with instructions from your office bearing date the fourth day of January, 1872, I herewith submit the following report and return of the improvements and character of the same in and upon that certain mining claim known as the Summit Quartz Mine, a gold bearing Vein or Lode of Quartz Rock situate in Sutter Mining District, Sections 7 and 8, Township 6

North, Range 11 East, Mount Diablo Base and Meridian, County of Amador, State of California.

Total Valuation of Labor and Improvements.

From the affidavits of Allen Tibbits and John Keyes, herewith exhibited and marked respectively Exhibits A and B and made parts of this return and report. The least amount set forth in said affidavits as the value of the labor and improvements placed in and upon said Summit Quartz Mine, is fifty-five thousand three hundred dollars.

Character of Improvements.

The character of the improvements upon said Summit Quartz Mine are as follows, to wit:

Two shafts, each 300 feet deep.

One shaft 45 feet deep.

Hoisting works and other buildings.

The ore has been worked by ordinary milling process:—average yield not known.

The dip of the vein is east, forming an angle with the horizon of ——.

79 No mill attached to the property.

Mine not pumped.

Timber distant from mine about eight miles.

Lode is accessible by a road.

Respectfully, &c.,

WILLIAM L. McKIM,
U. S. Deputy Mineral Surveyor.

List of Names.

A list of the names of the individuals employed to assist in running, measuring, or marking the lines and corners described in the foregoing field notes of survey of the Summit Quartz Mine, numbered 48, Sutter Mining District, Sections 7 and 8, Township 6 North, Range 11 East of Mount Diablo Meridian, County of Amador, State of California, showing the respective capacities in which they acted.

William L. McKim, U. S. Dept. Surveyor, Compassman.

D. D. Reaves, Chainman.

Allen Tibbits, Chainman.

—— ——, Axeman.

Final Oaths of Assistants.

We hereby certify that we assisted William L. McKim, U. S. Deputy Surveyor, in surveying that certain mining claim, known as the

Summit Quartz Mine, and numbered 48; a gold bearing
80 quartz vein, or lode of gold bearing quartz rock in the Sutter Mining District, Sections 7 and 8, Amador Co. Cala. and that said survey has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments planted according to the instructions furnished by the Surveyor-General.

D. D. REAVES,
ALLEN TIBBITS.

Subscribed and sworn to before me, this 22nd day of January, 1872.

WILLIAM L. McKIM,
U. S. Deputy Surveyor.

Final Oath of Deputy Surveyor.

I, William L. McKim, Deputy Surveyor, do solemnly swear that in pursuance with instructions from J. R. Hardenbergh, United States Surveyor-General for California, bearing date the 4th day of January, 1872, I have well, faithfully and truly, in my own proper person, and in strict conformity with the instructions furnished by the Surveyor-General, the Surveying Manual, and the laws of the United States, surveyed all those parts or portions of that certain mining claim, known as the "Summit" Quartz Mine, numbered 48, a gold bearing quartz vein, or lode of gold bearing quartz rock,
81 in the Sutter Mining District, Sections 7 and 8, Township 6 North, Range 11 East of Mount Diablo Meridian in the County of Amador, State of California, as are represented in the foregoing field notes as having been surveyed under my directions; and I do further solemnly swear that all the corners of said surveys have been established and perpetuated in strict accordance with the Surveying Manual and printed instructions, and that the foregoing are the true and original field notes of such survey.

WILLIAM L. McKIM,
U. S. Deputy Surveyor.

Subscribed and sworn to before me, this 2d day of April, 1872.

R. M. BRIGGS,
[NOTARIAL SEAL.] *Notary Public, Amador County.*

Register's Certificate.

To United States Surveyor General:

U. S. Land Office, Sacramento, Cal., Oct. 30th, 1871.

In relation to Application No. 193 of Hall McAllister for Patent to a Quartz Gold Mining Claim, Situated in Amador County, California.

Duplicate.

82 I hereby certify that the records and files of this office show:

First:—That the above application No. 103 for a patent to said mining claim, together with a copy of the diagram and notice thereof, were filed in this office on the 7th day of February, 1871.

Second:—That on the same day the copy of said notice and diagram were duly posted in this office, and remained so posted for ninety consecutive days.

Third:—That said notice and diagram were duly posted on said claim on the 31st day of January, 1871, and remained so posted for ninety consecutive days.

Fourth:—That upon the order of the Register of this office, a copy of said notice was duly published in the Amador Weekly Ledger for said period of ninety days, the same being a newspaper published at Jackson in Amador County, State aforesaid.

Fifth:—That no claim exists against the United States Government for the cost of such publication, all claim therefor having been waived by an agreement duly filed with said application.

Sixth:—And I further certify that no adverse mining claim to any portion of said mining claim has been filed in this office.

83 Being in Sections 7 and 8, Tp. 6 N. R. 11 E. Mt. D. B. & M.

In witness whereof, I have hereunto set my hand and official seal, the day and year first above written.

(L. S.) JOHN G. McCALLUM,
Register.

Register's Seal, Sacramento.

U. S. Surveyor-General's Office,

San Francisco, Cal., *June* 4, 1872.

The foregoing Field Notes of the Surveys of the Summit Quartz Mine, claimed by Hall McAllister, in Amador County, Township 6 North, Range 11 East, Mount Diablo Meridian, in the State of California, executed by William L. McKim, U. S. Deputy Surveyor, under his instructions dated January 4, 1872, having been critically

examined, and the necessary corrections and explanations made, the said Field Notes and the Surveys they describe are hereby approved.

J. R. HARDENBERGH,
U. S. Surveyor-General for California.

U. S. Surveyor-General's Office,

SAN FRANCISCO, *June* 8, 1872.

I, J. R. Hardenbergh, U. S. Surveyor-General for Cali-
84 fornia, do hereby certify that the foregoing Transcript is a full, true and correct copy of the original Field Notes, as the same remains of record and on file in this office.

Attest my hand and official seal the day and date hereinabove written.

[SEAL.] J. R. HARDENBERGH,
U. S. Surveyor-General for California.

(No. 103.)

United States Land Office.

SACRAMENTO, CAL., *February 6th,* 1871.

In the Matter of the Application of HALL MCALLISTER

for a Patent to a Quartz Gold bearing Mining Claim, soon to be filed in said office, I have agreed with said application to accept, and hereby agree to accept said applicant for the payment of the costs of publishing the notice therein in the Amador Weekly Ledger published in Jackson, Amador County, California, the time prescribed by law, as may be ordered by the Register of said Office, and hereby waive all claim against the Government of the United States for the cost of such publication.

T. A. SPRINGER, [SEAL.]
Publisher of the Amador Weekly Ledger.

85 (No. 103.)

Application for a Patent to a Quartz Gold Mining Claim.

United States Land Office,

SACRAMENTO, CAL., *February 7th,* 1871.

Hall McAllister having filed his application in this office for a Patent to a Mining Claim, and the law and instructions in such cases provided, having been complied with, It is hereby ordered that the annexed Notice of such Application be published for ninety days

in the "Amador Weekly Ledger," a newspaper published nearest the location of said claim at Jackson in Amador County, State of California.

[SEAL.] JOHN G. McCALLUM,
Register.

[Endorsed as follows:]
No. 103. Publishers' Agreement and Register's Order of Publication. Filed Feby. 7th, 1871.

STATE OF CALIFORNIA, *County of Amador, ss:*

T. A. Springer, being duly sworn, deposes and says that he is the publisher of the Amador Weekly Ledger, a weekly newspaper, printed and published at Jackson, in the State and County aforesaid, and that the Notice of Application for patent to a Quartz Mining Claim, hereunto attached, was printed and published in said
86 newspaper once a week for the space of ninety (90) days, prior to the date hereof, to-wit: from and including the 11th day of March, A. D. 1871, up to and including the issue of said newspaper of the 10th day of June, 1871, and that he has been paid in full for such publication.

THOMAS A. SPRINGER.

Subscribed and sworn to before me, this 21st day of July, A. D. 1871.

In testimony whereof, I hereunto set my hand and official seal, the day and year last above written.

[SEAL.] J. B. STEVENS,
Notary Public.

(No. 103.)

Application for a Patent to a Quartz Gold Mining Claim.

United States Land Office,

SACRAMENTO, CALIFORNIA, *February 7th*, 1871.

Hall McAllister, having filed his application in this office for a patent to a mining claim, and, the law and instructions in such cases provided having been complied with, it is hereby ordered that the annexed notice of such application be published for ninety days in the Amador Weekly Ledger, a newspaper published nearest the location of said claim at Jackson, in Amador County, State of California.

JOHN G. McCALLUM,
Register.

87 (Copy of the Notice posted on the claim.)

Application for a Patent for a Gold Quartz Claim.

Notice is hereby given to whom it may concern, that it is the intention of the undersigned, Hall McAllister, to make immediate application to the Government of the United States for a patent to the following described quartz gold mining lode claim, containing gold bearing quartz rock in place, known as the Summit Mining Company's claim, situate, lying and being in Sutter Creek Mining District, County of Amador and State of California, commencing at a post of said lode, to which is attached this notice, and a diagram of said claim, at a point where said claim joins the Amador Mining Company's claim or lode (formerly known as the Hayward mine) on the north; thence running south 31° 02′ east, on what is known as the Badger or Hayward lode, twelve hundred and thirty feet, to the center of the Volcano and Ione City road; also a sufficient quantity of surface ground on each side of said lode for the convenient use and working of said mine to-wit: three hundred feet in width on each side of said lode or vein, the entire length thereof, more particularly described as follows, to-wit: commencing at the post above mentioned, thence running north 78° 48′ east, three hundred
88 feet to a post; thence south 31° 02′ east, twelve hundred and five feet to a post; thence south 67° west five hundred and eighty-five feet to a post; thence north 31° 02′ west, twelve hundred and eighty-seven feet to a post; thence 78° 48′ east, three hundred feet to the place of beginning containing 16.05 acres of the surveyed public land of the United States, subject to sale in the Sacramento Land District, California, on the west half of the southwest quarter of section eight (8) and the southeast quarter of the southeast quarter of section seven (7) in township number six (6) north, range eleven east, Mount Diablo base and meridian, the same embracing the Summit Mining Company's lode or vein above described. All persons holding any adverse claims thereto, or any part thereof, are hereby required to present the same before the Register and Receiver of the United States Land Office for Sacramento Land District, at Sacramento, California, within ninety (90) days from the first publication of this notice.

Posted on said claim, January 31st, 1871.

HALL McALLISTER.

JOHNSON & SEVERANCE, 92 *J Street*,
Attorneys for Applicant.

Mar11ds90.

[Endorsed as follows:] No. 103. Affidavit of Publication of Notice. Filed July 25th, 1871.

89 *Application for a Patent for a Gold Quartz Claim.*

Notice is hereby given to whom it may concern that it is the intention of the undersigned, Hall McAllister, to make immediate application to the Government of the United States for a patent to the following described Quartz Gold Mining lode claim, containing gold bearing quartz rock in place, known as the Summit Mining Company's claim, situated lying and being in Sutter Creek Mining District, County of Amador and State of California, commencing at a post on said lode, to which is attached this notice and a Diagram of said claim, at a point where said claim joins the Amador Mining Company's claim or lode (formerly known as the Haywood mine) on the North, thence running South 31° 02′ East, on which is known as the Badger or Haywood Lode, twelve hundred and thirty feet, to the center of the Volcano and Ione City Road. Also a sufficient quantity of surface ground on each side of said lode, for the convenient use and working of said mine, to-wit, three hundred feet in width on each side of said lode or vein, the entire length thereof, more particularly described as follows, to-wit: Commencing at the post above mentioned, thence running North 78° 48′ East, three hundred feet to a post; thence South 31° 02′ East, twelve hun-
90 dred and five feet to a post; thence South 67° West five hundred and eighty-five feet to a post; thence North 31° 02′ West twelve hundred and eighty-seven feet to a post; thence 78° 48′ East three hundred and — feet to the place of beginning, containing 16.05 acres of the surveyed public lands of the United States subject to sale in the Sacramento Land District, California, on the West half of the South West quarter of Section Eight (8) and the South East quarter of the South East quarter of Section Seven (7) in Township number six (6) North Range Eleven (11) East Mount Diablo Base and Meridian, the same embracing the Summit Mining Company's lode or vein, above described.

All persons holding any adverse claim thereto, or any part thereof, are hereby required to present the same before the Register and Receiver of the United States Land Office for Sacramento Land District, at Sacramento, California within ninety (90) days from the first publication of this notice.

Posted on said claim January 31st, 1871.

HALL McALLISTER.

JOHNSON & SEVERANCE,
92 *J Street, Sacramento, Attys. for Applicant.*

Posted in U. S. Land Office Sacramento Feby 7th 1871.

91 STATE OF CALIFORNIA, *County of Amador.*

Allan Tibbits being duly sworn deposes and says that he was present when the notice and diagram hereunto attached were posted

on the Summit Mining Claim described in said notice and diagram, that the same were posted in a conspicuous place on said Mining Claim, to-wit: Upon a post at the north end of said claim, on the 31st day of January, 1871, and remained so posted for the term of ninety days consecutively from the date of such posting, and said Allen Tibbits further says, that he has no interest in said mining claim.

ALLEN TIBBITS.

Subscribed and sworn to before me this 2nd day of Aug. 1871.

In testimony whereof I hereunto set my hand and affix my official seal the day and year last above written.

[SEAL.] THOS. DUNLAP.
Notary Public.

STATE OF CALIFORNIA, *County of Sacramento, ss.*

John A. Eagan being first duly sworn says that he is a citizen of the United States over the age of twenty-one years, a resident
92 of Sutter Creek in the County of Amador, state aforesaid, and is a member of the Assembly of said state; that he posted the notice and diagram, of which the within is a true and correct copy, on the said Summit Mining Claim described in said notice and diagram, in a conspicuous place, to wit, upon a post at the north end of said claim, on the thirty-first day of January, A. D. 1871, and the same were not taken down until after the eleventh day of June, A. D. 1871; that Allan Tibbits was present at the time he so posted said notice and diagram; that the reason the same copies of said notice and diagram so posted are not filed herewith is that the same had become mutilated and disfigured by their long exposure. Affiant further says that he has no interest in said mining claim.

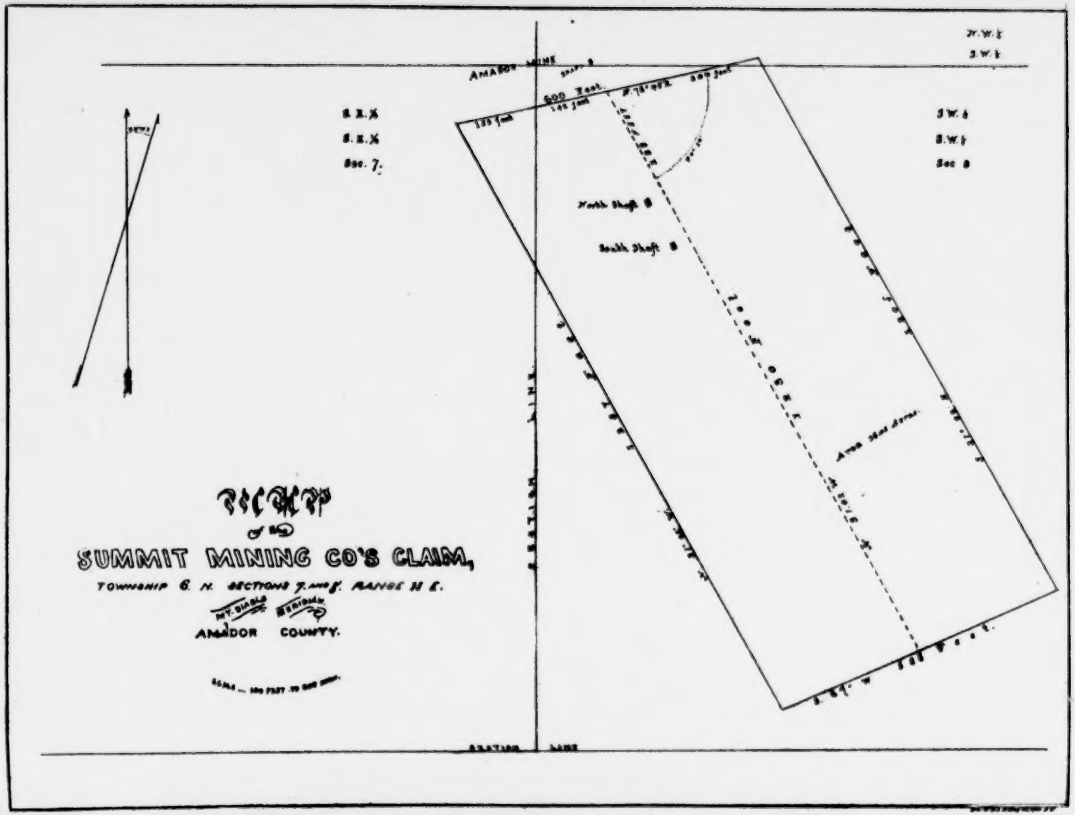
JOHN A. EAGAN.

Subscribed and sworn to before me this 4th day of April, A. D. 1872.

[SEAL.] WM. NEELY JOHNSON,
Notary Public.

[Endorsed as follows:]
No. 103. Affidavits of posting Notice & Diagram on the Claim. Filed April 6th, 1872.

(Here follows diagram marked p. 93.)



No. 447.
C. & M. Record, Jan 93
Cal. Co

94 & 95 To the Register and Receiver of the United States Land Office of the Sacramento District at Sacramento, Sacramento County, State of California; and to the Commissioner of the General Land Office, Washington City, D. C.

GENTLEMEN: Your petitioner, Hall McAllister, a native born citizen of the United States, a resident of the City and County of San Francisco, State of California, hereby makes application, under and by virtue of the provisions of an Act of Congress, entitled "An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July 26th A. D. 1866, to locate and purchase, for himself, individually, as and for a gold bearing quartz lode claim all that certain vien of quartz rock in place and gold bearing quartz ledge or lode, known as the Summit Mining Company's Claim, situate, lying and being in Sutter Creek Mining District, County of Amador, State of California, commencing at a post on said lode, to which is attached a notice and a diagram of said claim, true and correct copies of which accompany this application, at the extreme southern end of the Amador Mining Company's claim or lode (formerly known as the Hayward mine) which said mining claim it joins on the North, thence
96 running South 31° 02′ East, on what is known as the Badger or Hayward Lode, twelve hundred and thirty feet to the center of the Volcano and Ione City Road; also a sufficient quantity of surface ground on each side of said lode for the convenient use and working of said mine, to-wit, three hundred feet in width on each side of said vein or lode the entire length thereof; more particularly described as follows: commencing at the post above mentioned, standing at the extreme southern end of the Amador Mining Company's cliam, thence running North 78° 48′ East, three hundred feet to a post; thence South 31° 02′ East, twelve hundred and five feet to a post; thence South 67° West, five hundred and eighty-five feet to a post; thence North 31° 02′ West, twelve hundred and eighty-seven feet to a post; thence 78° 48′ East three hundred feet, to the place of beginning, containing 16.05 acres of the public lands subject to sale in said United States Land District at Sacramento, State of California, in the West half of the South West quarter of Section Eight (8) and the South East quarter of the South East quarter of Section Seven (7) in Township Six (6) North, Range Eleven (11) East, Mount Diablo Base and Meridian, being surveyed lands and returned as mineral lands by the United States Surveyor
97 General, and embracing the Summit Mining Company's lode or vein, above described.

Your petitioner shows that his possessory right to said above described land is derived from the original locators thereof, from a location made of the north seven hundred and eighty feet, March 26, 1863, and of the remainder thereof, June 22nd, 1865, according to the rules and customs of miners in force in said Mining District, the said north seven hundred and eighty feet having been duly recorded by the Recorder of said Mining District in the Book of

Records for mining claims of said District, on the 26th day of March, A. D. 1863, the remaining portion of said lode having been duly recorded by the said Recorder in said Book of Records, on the 22nd day of June, 1865, and also by the County Recorder of said Amador County, in Book "A" of the Mining records of said County, page 112, ever since which time, to-wit, for more than two years last past, the same being the time prescribed by the Statutes of Limitations for mining claims of said State of California, your petitioner and those under whom he claims have occupied and improved said lode, and been engaged in extracting the gold bearing quartz therefrom, according to the customs and rules of the miners in said mining district, and under the laws of said State and the implied
98 sanction of the United States; and the said local rules have, at all times, been complied with by your petitioner and those under whom he claims; that such possession and occupation has at all times been exclusive, actual and uninterrupted, and there is no controversy or opposing claim within the knowledge, information or belief of your petitioner in regard to the possession of the same or any part or portion thereof by any person or association of persons whatever.

Your petitioner further shows that he has expended in labor and permanent mining improvements on said claim, in sinking shafts and erecting hoisting works with the necessary machinery, blacksmith shop and other necessary buildings thereon, for the development thereof, more than one thousand dollars, to-wit: to the value of about eighty thousand dollars.

Your petitioner further shows, that on the 31st day of January, A. D. 1871, he caused a diagram of said Summit Mining Company's claim, together with a written notice of his intention to make this application for a patent therefor, to be posted in a public and conspicuous place on said claim, to-wit, on a post hereinbefore described, standing at the extreme southern end of the Amador Mining Company's claim, on the northern end of said Summit Mining Company's claim, full, true and correct copies of which said Dia-
99 gram and Notice are hereunto attached and herewith submitted.

Your petitioner, in conformity to the regulations of this department, herewith presents a certified copy of the laws or customs of the miners of said Sutter Creek Mining District in force at the date of the location of said Summit Mining Company's mine aforesaid, and a certificate, under seal, of the County and Mining Recorders of said County and Mining District, giving copies of the original locations of said claim, hereinbefore mentioned, with the names of the locators thereof; also an abstract of title, tracing your petitioner's right of possession from said original locators to himself.

STATE OF CALIFORNIA, *County of Sacramento, ss:*

In the Matter of the Application of the Summit Mining Company for Entry and Patent to Quartz Lode and Surface Ground.

Jesse B. Maxey being duly sworn says: I am a citizen of the United States and fifty-four years of age; I reside in the Sutter Creek Mining District, County of Amador, State of California; I have heretofore been engaged in mining in said district; I know the location of the Summit Mine and the mining rules of said district in which said Summit Mine is situated; I have seen the diagram appended
100 to the petition of said Company for entry of and patent to lode and surface ground. I am familiar with the customs and usages of miners in said mining district, and to the holding of surface ground in connection with a mine, for milling and mining purposes; It is a well recognized custom and usage of miners, that the owners of mining claims shall hold and have occupancy of so much surface ground, in connection with the mine, as shall be necessary for reduction works, hoisting works, dumpage and drainage; By such custom and usage said company should have and will require, and are in the actual occupancy of at least 16.05 acres of surface ground; I know that said company is in possession of said ground described in said diagram, and that the ledge of the company passes through and dips in said ground, and that the same is required by said company for milling and mining uses; and the works which are thereupon, together with other expenditures which have been made thereon have cost over fifty thousand dollars.

JESSE B. MAXEY.

Subscribed and sworn to before me this 3rd day of April, A. D. 1872.

[SEAL.] WM. NEELY JOHNSON,
Notary Public, Sacramento, Cal.

101 County Clerk in and for Amador County, California.

STATE OF CALIFORNIA, *County of Amador, ss*

On this 16th day of March A. D. 1871, before me, County Clerk in and for said County, personally appeared J. Foot Turner personally well known to me, and known to me to be the individual described in and who executed the within Declaration of Abandonment of Pre-emption Claim No. — and the said J. F. Turner acknowledged to me that he executed the said Declaration of Abandonment freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the Court House Jackson, the day and year aforesaid.

[L. S.] D. B. SPAGNOLI,
County Clerk.

U. S. LAND OFFICE.
SACRAMENTO, CAL., *April* 11, 1871.

I hereby certify the within and foregoing to be a full true and correct copy of the abandonment of J. Foot Turner to Hall McAllister offered and received as evidence in the case of Town Site of Sutter Creek the original remaining on record in this
102 office.

HART FELLOWS, *Receiver.*

[Indorsed as follows:] No. 1811. Abandonment of Pre-emption Claim of County Judge to Summit Quartz Mine: Section —, T. — N. — R. — E., Dated March 16th, 1871. Filed April 5th, 1871.

—— ——, *Register.*

Abandonment of Pre-emption Claim.

To the Register of the United States Land Office at Sacramento, California.

SIR: I hereby give you notice, that whereas, I did on the 22nd day of September, A. D. 1870, file in your office my Declaratory Statement, No. 1811 claiming right of pre-emption to the S ½ of Section 6 and all of Section 7, T. 6 N., R. 11 E., Mount Diablo Meridian.

I do hereby declare that I have abandoned the same so far as it affects the Quartz ledge and surface ground claimed by Hall McAllister as described in his application No. 103 and the Diagram thereof now on file in this office being in Sections 7 & 8, Township 6 N. Range 11 E., the land above described, and I hereby request that my said Pre-emption Claim No. 1811 may be cancelled on the
103 records and files of your Office, as to the lands hereby abandoned.

In witness whereof, I have hereunto set my hand and seal, at Jackson, 16″ day of March, A. D. 1871.

[L. S.] J. FOOT TURNER, [SEAL.]
County Judge Amador Co.

Subscribed and declared to before me, this 16″ day of March, A. D. 1871.

D. B. SPAGNOLI,
Register, County Clerk Amador County, Cal.

UNITED STATES OF AMERICA:

Sacramento District, California.

LAND OFFICE, SACRAMENTO, CAL., *Oct.* 10", 1871.

Base and Meridian of Mount Diablo.

Citation Before the Register and Receiver of Land Office at Sacramento.

In the Matter of the Claim of Hall McAllister App for Patent No. 103 to the Summit Quartz Mine & Surface Ground on SE ¼ of SE ¼ of Sec. 7 and SW ¼ of SW Quarter of Section No. 8 Township No. 6 North Range No. 11 East.

At the request of the above claimant, and Applicant for
104 Patent No. 103 it is hereby ordered, That John S. Tanner D. S. 1369 also claiming as agricultural a portion the above described tract of land, be and appear before the Register and Receiver, at the Land Office, Sacramento, at 1 o'clock p. m., on the 16th day of November, A. D. 1871, then and there to produce evidence to contest the claim of the said Hall McAllister and offer proofs as to character of said land or the same will be awarded to him upon the proper proof that he has fully met the requirements of the Mineral Law and Instructions.

Witness our hands and the seal of this office the day and date first above written.

[SEAL.] JOHN G. McCALLUM, *Register.*
HART FELLOWS, *Receiver.*

United States Land Office.

SACRAMENTO, CALIFORNIA.

I, John A. Eagan, a white male citizen of the United States over the age of twenty-one years, hereby certify that I certify that I served the within notice upon John S. Tanner by delivering to him a true and correct copy thereof, on the 14th day of October, 1871, at the town of Sutter Creek in the County of Amador & State of California.

JOHN A. EAGAN. [L. S.]

105 I hereby certify that I consider said Affiant John Eagan is a credible and respectable person, and that the foregoing affidavit was sworn and subscribed to before me this 17th day of October A. D. 1871.

In witness whereof I have hereunto set my hand & affixed my official seal the day and year last above written.

[SEAL.] J. C. SHIPMAN, *Dept.*
Notary Public, Amador Co., Cal.

[Endorsed as follows:] See Affidavit. Citation. In the matter of the application of Hall McAllister to pre-empt Summit Quartz Mine, Sec. T. 6 N. R. 11 E. D. S. Appm. filed Feby. 7th, 1871. Settlement claimed — I hereby accept service of the within Citation, this — day of — 187-, and waive further notice.

United States Land Office.

SACRAMENTO, CALIFORNIA, *July 6th*, 1872.

To Hall McAllister and to all whom it may concern:

Whereas, You filed your application in the U. S. Land Office, alleging land in NW ¼ of SW quarter of Section 8, in Township 6 North, Range 11 East, to be mineral in character,

And whereas, On the 5th day of July, 1870, the plat of
106 Township 6 North, Range 11 East, was filed in the U. S. Land Office at Sacramento, Cal., wherein the N ½ of SW ¼ and SE ¼ of SW ¼ and NW ¼ of SE Quarter of Section 8 in Township 6 North Range 11 East is returned as mineral in character, and more valuable for mining than for agricultural purposes.

And whereas, Francis M. Morgan (Post Office address Sutter Creek, Cal.) did, on the 27th day of July, A. D. 1870, file in the Register's office of this District his Declaratory Statement claiming the land, and an affidavit alleging that it is agricultural in character, and more valuable for agricultural than for mining purposes;

Now therefore, you will please take notice, that under and by virtue of instructions from the commissioner of the General Land Office, dated May 6th, 1871, we have fixed the 13th day of August, A. D. 1872, at 10 o'clock a.m., at this office, before the Register and Receiver, for the hearing of proofs to determine as to the mineral or agricultural character of said lands. At which time and place you may appear, if you see proper, and offer such proofs as you may have to sustain the return as made of said survey, and the allegations contained in said application.

In witness whereof, we have hereunto set our hands and
107 affixed the seal of this office, the day and year first above written.

[SEAL.]

T. B. McFARLAND, *Register.*
HART FELLOWS, *Receiver.*

Affidavit of Service.

United States Land Office.

SACRAMENTO, CALIFORNIA.

Each of the undersigned being duly sworn, says, each for himself: I am a white citizen of the United States, over the age of twenty-one years; said —— —— served the within notice upon —— ——

by delivering to each of them a true and correct copy thereof on the — day of —— 187—, that after due and diligent search said —— —— was unable to find either of the other within named mineral affiants in said county or district, whom he served, by posting a full true and correct copy of the within notice upon — conspicuous places on each forty acre tract of the within described land, on the — day of —— A. D. 187—, and that said notice was so posted for the space of thirty days, consecutively, from the first day of posting.

Sign —— ——
Sign —— ——

I hereby certify that I consider each of said affiants —— —— is a credible and responsible person, and that the foregoing
108 affidavit was sworn to and subscribed before me this — day of —— —— A. D. 187—.

—— ——,
Register.

[Endorsed as follows:]
Mineral Citation. Francis M. Morgan *v.* Hall McAllister.
Mineral Affidavit No.——.

UNITED STATES OF AMERICA:

Sacramento District, California.

LAND OFFICE, SACRAMENTO, CAL., *Oct.* 10, 1871.

Base and Meridian of Mount Diablo.

Citation Before the Register and Receiver of the Land Office at Sacramento.

In the Matter of the Claim of Hall McAllister App. for Patent No. 103 to the Summit Quartz Mine & Surface Ground on SE ¼ of SE ¼ of Sec. 7 and SW ¼ of SW Quarter of Section No. 8, Township No. 6 North, Range No. 11 East.

At the request of the above claimant, and Applicant for Patent No. 103 it is hereby ordered, That The Placerville & S. V. R. R. Company also claiming a portion of the above described
109 tract of land, be and appear before the Register and Receiver, at the Land Office, Sacramento, at 1 o'clock, P. M., on the 16th day of November A. D. 1871, then and there to produce evidence to contest the claim of the said Hall McAllister and offer proofs as to the character of said land or the same will be awarded to him upon the proper proof that he has fully met the requirements of the Mineral Law and Instructions.

Witness our hands and the seal of this office the day and date first above written.

[SEAL.] JOHN G. McCALLUM, *Register.*
HART FELLOWS, *Receiver.*

United States Land Office.

SACRAMENTO, CALIFORNIA.

I, —— ——, a white male citizen of the United States, over the age of twenty-one years, hereby certify that I served the within notice upon —— —— by delivering to each of them a true and correct copy thereof, on the — day of —— 1871, that after due and diligent search I was unable to find the within named —— —— in this county or district, whom I served by posting a full, true and correct copy of the within notice upon —— —— a conspicuous place
110 on that portion of the within described land which is claimed by said adverse claimant on the — day of —— A. D. 1871, and that said notice was so posted for the space of thirty days, consecutively, from the first day of posting.

—— —— [L. S.]

I hereby certify that I consider said affiant —— —— is a credible and respectable person, and that the foregoing affidavit was sworn and subscribed to before me this — day of —— A. D. 1871.

—— —— *Register.*

[Endorsed as follows:]

Citation.

In the matter of the application of Hall McAllister to Summit Quartz Mine Sec. — T. 6 N. — R. 11 Appn. Filed Feby. 7th. 1871. Settlement Claimed.

I hereby accept service of the within Citation, this 12 day of Oct. 1871, and waive further notice.

B. B. REDDEN,
Atty. for S. & V R R Co.

Abandonment of Pre-emption Claim.

To the Register of the United States Land Office at Sacramento, California.

SIR: I hereby give you notice, that whereas, I did on the
111 27th day of July A. D. 1870, file in your office my Declaratory Statement, No. 1368 claiming right of pre-emption to the N ½ of SW ¼ and SE ¼ & NW ¼ of SE Quarter of Section 8 T. 6 N., R. 11 E., Mount Diablo Meridian.

I do hereby declare that I have abandoned the same so far as it conflicts with Application No. 103 for Patent to Mining Claim by Hall McAllister in W ½ of SW quarter section 8, Township 6 N. Range 11 E., the land above described, and I hereby request that my said Pre-emption Claim 1368 may be cancelled on the records and files of your Office, as to the land hereby abandoned.

In witness whereof, I have hereunto set my hand and seal, at Sacramento, this 13th day of August A. D. 1872.

FRANCIS MADISON MORGAN [SEAL.]

Subscribed and declared to before me, this 13th day of August, A. D. 1872.

T. B. McFARLAND, *Register.*

County Clerk in and for —— County, California.

STATE OF CALIFORNIA, *County of* ——.

On this — day of ——, A. D. 187—, before me, County
112 Clerk in and for said county, personally appeared —— —— personally well known to me, and known to me to be the individual described in and who executed the within Declaration of Abandonment of Pre-emption Cliam No. ——, and the said —— —— acknowledged to me that he executed the said Declaration of Abandonment freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, at —— the day and year aforesaid.

—— ——.

(Endorsed on back as follows:)

No. 1368. Abandonment of Pre-emption Claim of Francis M. Morgan to Summit Quartz Mine Section 8, T. 6 N., R. 11 E. Dated August 13th, 1872.

Filed August 13th, 1872.

—— ——, *Register.*

U. S. LAND OFFICE,

SACRAMENTO, CAL., *Sept. 14th,* 1872.

I hereby certify the foregoing to be a true and correct copy of an Abandonment on file in this Office of Francis Madison Morgan.

T. B. McFARLAND, *Register.*

113 *Abandonment of Pre-emption Claim.*

To the Register of the United States Land Office at Sacramento, California.

SIR: I hereby give notice, that whereas, I did on the Twenty Seventh day of July, A. D. 1870, file in your Office my Declaratory

Statement, No. 1369, claiming right of pre-emption to the South West quarter of the South West quarter of Sec. Eight the West half of the North West quarter and the North East quarter of the North West quarter of Section Seventeen (17) T. Six N., R. Eleven E. Mount Diablo Meridian.

I do hereby declare that I have abandoned the same so far as it affects all that portion claimed and applied for by the Summit Mining Company on the South West quarter of the South West quarter section eight, Township 6 N. North Range Eleven E. of the land above described, and I hereby request that my said Pre-emption Claim No. 1369 may be canceled on the records and files of your Office, as to the lands hereby abandoned.

In witness whereof, I have hereunto set my hand and seal,
114 at Sacramento, the 15th day of November, A. D. 1871.

JOHME
JOHN S. TANNER [SEAL].

Subscribed and declared to before me, this 15th day of November, A. D. 1871.

HART FELLOWS, *Receiver.*

County Clerk in and for —— County, California.

STATE OF CALIFORNIA, *County of Sacramento.*

On this 15th day of November, A. D. 1871, before me, County Clerk in and for said county, personally appeared John S. Tanner personally well known to me, and known to me to be the individual described in and who executed the within Declaration of Abandonment of Pre-emption Claim No. 1369, and the said John S. Tanner acknowledged to me that he executed the said Declaration of Abandonment freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, at ——, the day and year aforesaid.

—— ——.

(Endorsed as follows:) No. 1369. Abandonment of
115 preemption claim of John S. Tanner to SW ¼ of SW ¼ Sec. 8 & W. ½ of NW ¼ Section 17, T. 6 N., R. 11 E. Dated Nov. 16th, 1871. Filed Nov. 16th, 1871.

—— ——, *Register.*

Register's Certificate to United States Surveyor General.

U. S. Land Office, Sacramento, Cal.

OCT. 30TH, 1871.

In Relation to Application No. 103 of Hall McAllister for Patent to a Quartz Gold Mining Claim, Situated in Amador County, California.

I hereby certify that the records and files of this office show:

First. That the above application No. 103 for a patent to said mining claim, together with a copy of the diagram and notice thereof, were filed in this office on the 7th day of February, 1871.

Second. That on the same day the copy of said notice and diagram were duly posted in this office, and remained so posted for ninety consecutive days.

Third. That said notice and diagram were duly posted on said claim on the 31st day of January, 1871, and remained so
116 posted for ninety consecutive days.

Fourth. That upon the order of the Register of this office a copy of said notice was duly published in the "Amador Weekly Ledger" for said period of ninety days, the same being a newspaper published at Jackson in Amador County, State aforesaid.

Fifth. That no claims exists against the United States Government for the cost of such publication, all claim therefor having been waived by an agreement duly filed with said application.

Sixth. And I further certify that no adverse mining claim to any portion of said mining claim has been filed in this office

Being in Sections 7 & 8 Tp. 6 N. R. 11 E. Mt. D. B. & M.

In witness whereof, I have hereunto set my hand and official seal, the day and year first above written.

[SEAL.] JOHN G. McCALLUM, *Register.*

(Endorsed as follows:) Register's Certificate to U. S. Surv. Gen'l. Issued and filed Oct. 30th 1871.

STATE OF CALIFORNIA, *County of Amador, ss:*

117 Allan Tibbitts being duly sworn and says he resides in Amador County, California, and within one mile from the Summit Mine, and in what is known as the Sutter Creek Mining District, and has so resided since the month of August, 1851. Deponent says he is a miner, and has been engaged in mining in said district during the past twenty years; that he is well acquainted with the rules and customs of the miners in said district governing the location of mining claims, the number of feet that can be located and held on a vein or lode, and the amount of surface ground usually held for surface working. Deponent says that each claim may

consist of one hundred twenty feet on a vein or lode, including all the dips, angles and variations of the vein, the discoverer being entitled to one claim of one hundred twenty feet additional for discovery. Deponent says that it now is and has heretofore been the custom in said district for persons claiming or working quartz mines or lodes to claim and hold as much surface along and adjoining the vein or lode as they may desire for working or other purposes, provided the same does not conflict with an older or better right. Deponent says that he is well acquainted with the claim known as the Summit Mine; that he has worked on the vein or lode claimed and worked by the said Summit Mining Company, and that said vein or
118 lode is in the said Sutter Creek Mining District, and County of Amador, State of California, and contains but one known vein or lode so far as the same has been developed and so far as the surface or outcroppings indicate, and that from personal inspection and examination made by deponent, of the surface, veins and walls, it is the belief of this deponent that no other vein or lode exists within said surface ground except the single one claimed as the Summit vein or lode. Deponent further says that applicant and his grantors have erected hoisting works, machinery and other buildings on said mine, and sunk shafts and run drifts therein, and expended in money and labor, at least to the value of eighty thousand dollars; that the vein and surface ground applied for herein are correctly described and set forth in the notice and diagram on file herein, true and correct copies of which were posted on said claim (and there seen by deponent); that the surface ground asked for in said application is necessary for the use and working of said mine.

ALLEN TIBBITS.

Subscribed and sworn to before me this 23 day of April, A. D. 1872.

[SEAL.] JOHN KEYES,
Notary Public, Amador Co., Cala.

119 (Endorsed as follows:)

No. 103. Affidavit of Allen Tibbits as to labor and improvements and mining customs. Filed April 25th, 1872.

STATE OF CALIFORNIA, *County of Amador, ss:*

James Morgan, being first duly sworn on his oath says: I am a citizen of the United States, 44 years of age. I reside about two miles from the Summit Mining claim, in Amador County, State of California; I am one of the owners and superintendent of the Oneida Quartz Mining Claim, which is located about two miles from the said Summit Mining Claim, for which said Oneida Mining Claim a United States patent was recently issued and delivered to the company owning the same; I have been engaged in quartz mining in the vicinity of said mining claims for more than three years last past, and have been superintendent of said Oneida Mine for three years last past;

I have from time to time visited and familiarized myself with many of the numerous quartz mines in the vicinity of the Summit mine aforenamed, and have examined the vein or lode of said Summit mine together with the side walls, shafts and excavations, and said mine contains but one known vein or lode so far as the same as
120 has been developed, and, that, to the best knowledge and belief of deponent, from personal exmination and inspection of the surface ground claimed by said Summit Mining Company, no other vein or lode exists within said surface ground, except the said Summit Mine. Deponent further says that the said Summit Mining Company have erected at said mine, and within the lands claimed by them, hoisting works, shafts and several buildings for the use and benefit of the same, which together with labor and other expenditures, have cost twenty thousand dollars. Deponent further says that he has been down in the shafts sunk in said Summit mine, and has thoroughly inspected and examined the same.

JAS. MORGAN.

Sworn and subscribed to before me this eighth day of April, A. D. 1872.

[SEAL.] THOS. DUNLAP,
Notary Public, Amador Co., Cala.

UNITED STATES OF AMERICA.

STATE OF CALIFORNIA, *City and County of San Francisco, ss:*

Hall McAllister being duly sworn deposes and testifies as follows: I am 45 years of age and reside in the city and county of San Francisco, State of California, and am the applicant herein. I am
121 a native born citizen of the United States, and have resided in said city of San Francisco for 22 years last past. Affiant further says that the mining claim herein applied for, known as the Summit Mine, is correctly described in the notice and diagram filed herein, that he, affiant and applicant is now in the possession and occupancy of said claim, and that he and his grantors have held and worked the said claim for five years last past, and that he, applicant, has held and worked the same in conformity with the mining laws, rules and regulations of said Sutter Creek Mining District, wherein it is located, for more than two years last past, the period equal to the time prescribed by the Statutes of Limitations for Mining Claims of said State of California, continuously. That he, applicant, has expended in actual labor and improvements in developing said mining claim, by sinking shafts, running drifts, erecting hoisting works, machinery and other necessary structures, not less than fifty thousand dollars.

Affiant further says that he is in possession of said mining claim by purchase, true and certified copies of the deeds of purchase being herewith presented, and that he knows of no adverse claim, either

mineral or agricultural, to the possession of the mining claim herein applied for.

HALL McALLISTER.

122 Subscribed and sworn to before me this 17th day of April, A. D. 1872.

[SEAL.] SAM'L HERMAN,
Notary Public.

(Endorsed as follows:) No. 10—Affidavit of Citizenship of Hall McAllister and as to ownership of claim. Filed April 19th, 1872.

In the Matter of the Application for a U. S. Patent to the Summit Mine, before the Register and Receiver of the U. S. Land Office, Sacramento District, California.

In the petition and application filed herein, reference is made to deeds to said mine, from the grantors of said applicant, but inasmuch as said deeds showing the mesne conveyances would make the record somewhat voluminous and serve no practical, equitable or legal purpose, it has been deemed advisable to supply this character of proof by affidavits of possession reaching beyond the Statutes of Limitations, and reference is therefore made to these proofs consisting of the affidavits of Hall McAllister, the applicant, and John A. Eagan, Allan Tibbitts, Jesse B. Maxey and James Morgan, as to the possession, amount of money and labor expended; and as to
123 the mining rules, regulations and customs of miners in said Mining District; also to the affidavit of Wm. Neely Johnson, showing that no printed or written rules and regulations, or miners' customs can be found of record in said district; and that said rules and regulations must be established by oral proof. This memorandum is asked to be taken and considered as a part of the application and petition heretofore filed herein, as explanatory thereof.

HALL McALLISTER, *Applt.*,
By JOHNSON & SEVERANCE, *His Att'ys.*

STATE OF CALIFORNIA, *County of Sacramento, ss:*

Wm. Neely Johnson, being first duly sworn on his oath says that he is forty-one years of age, and one of the attorneys for the applicant in this case; that in his professional duties he has examined many witnesses, practical miners, in the Sutter Creek Mining District, wherein the Summit Mine claimed by Hall McAllister is located, and has had frequent occasion to examine the records of the County Recorder of Amador County, in which said claim is located, and has applied to one C. K. Johnson, who was many years ago the mining recorder of said Sutter Creek Mining District; and affiant says that

neither of said recorders could furnish him with either a writ-
124 ten or printed copy of the mining rules of said Mining District, as originally (many years ago) adopted; that said rules, as this affiant has been informed and verily believes, are now, and have been, for eight or ten years past disregarded, and that the customs of said Mining District are now, and have been, for some eight or ten years past, such as are stated in the affidavits of practical miners filed as proofs herein, and no rules have been adopted in said district to the best knowledge and information of this affiant up to this date.

WM. NEELY JOHNSON.

Subscribed and sworn to before me this 29th day of August, A. D. 1872.

[SEAL.] MATT F. JOHNSON,
Notary Public, Sacramento Co., Cal.

(Endorsed as follows:) No. 103. Affidavit of Wm. Neely Johnson as evidence of title, etc. Filed Aug. 29th, 1872.

1872.

Decision.

United States Land Office.

SACRAMENTO, CAL., *October 11th*, 1872.

In the matter of the application of Hall McAllister for a patent to a Quartz Gold mining claim situated in the Sutter Creek Mining
125 District, County of Amador, and State of California, on surveyed land, being Lot No. 51 in the S. ½ of Sections 7 & 8, Township 6 North, Range 11 East, Mount Diablo Base and Meridian. Application No. 103.

The records and files of this office show:

First.—That the above application No. 103, for patent to said mining claim, together with a copy of the diagram and notice thereof, were filed in this office on the 7th day of February, 1871.

Second.—That on the 7th day of February, 1871, a copy of said diagram and notice were duly posted in this office, and remained so posted for ninety consecutive days.

Third.—That said notice and diagram were duly posted on said claim on the 31st day of January, 1871, and remained so posted for ninety consecutive days.

Fourth.—That upon the order of the Register of this office a copy of said notice was duly published in the "Amador Weekly Ledger" for said period of ninety days, the same being a newspaper published at Jackson, in Amador County, State aforesaid, being nearest the location of the mine.

Fifth.—That no claim exists against the United States Government for the cost of such publication, all claim therefor having been waived by an agreement duly filed with said application.

126 & 127 Sixth.—That no adverse or opposing claim to any portion of said mining claim exists on the records and files of this office.

Seventh.—That Hall McAllister, the applicant herein, is a native born citizen of the United States.

Eighth.—That said applicant is in the possession of said mining claim by purchase and has been in the peaceable, uninterrupted, and continuous possession of the above described mining claim for over two years last past.

Ninth.—That said mining claim was located on or about the — day of —— —— 187 .

Tenth.—That said applicants have expended in actual labor and improvements on said mining claim an amount of not less than one thousand dollars, namely: about twenty thousand ($20,000.00) dollars.

Eleventh.—That said applicants have complied with the requirements of the acts and regulations in such cases provided.

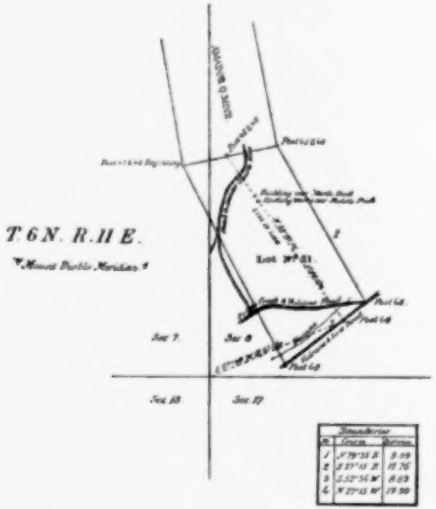
Conclusion.

In view of the foregoing facts, we are of the opinion that the said applicant should be permitted to enter and pay for said quartz gold mining claim, and receive a patent therefor from the United

129 States, as provided in the Acts of Congress of July 26th, 1866, and the Act amendatory thereof of July 9th, 1870.

T. B. McFARLAND, *Register.*
HART FELLOWS, *Receiver.*

(Here follows diagram marked p. 128.)



PLAT
OF THE
SUMMIT QUARTZ MINE
AMADOR COUNTY, CALIFORNIA.

claimed by

Hull McAllister

surveyed by

William L. Wilson, U.S. Dep. Surv.

January 1872.

Containing 15 Lin. Acres

Made 5 Jan. to 9 inclu.

Var. 16° 14 East.

The fieldnotes of the survey of the Summit Gold Quartz Mining Claim, from which this plat has been made, have been examined and approved, and are on file in this Office, and I hereby certify that the lode claimed is gold bearing and that the value of labor and improvements thereon is not less than one thousand dollars as shown by the report of the Deputy Surveyor and the testimony of two witnesses, and I further certify that this claim is not embraced within the boundaries of any other claim, nor does this claim include within its boundaries any portion of another claim.

U.S. Surveyor General's Office
San Francisco, California
June 4th 1872.

J. R. Hardenbergh
U.S. Surv. Gen'l Calif.

No. 447.
C. C. Min. Co. Calif.
C. C. Min. Co.
p 128

U. S. Land Office.

SACRAMENTO, CAL. *Oct. 16th*, 1872.

Hon. Comr. of the Genl. Land Office, Washington, D. C.

SIR: I have the honor to transmit herewith the proofs and papers in the Application for Patent No. 103 of Hall McAllister to the Summit Quartz Mine Cash Entry No. 118.

Together with the joint opinion of the Register and Receiver therein.

Also the Receiver's receipt and the Register's Certificate of purchase.

Very respectfully T. B. McFARLAND, *Register.*

[Endorsed as follows:]

U. S. Land Office, Sacramento, Cal., October 18th, 1872. Register transmits herewith proofs and papers in Mineral Cash Entry No. 118 by Hall McAllister

130 W. E. DOWNS, sworn on behalf of plaintiff, testified as follows:

I am now and have been for fifteen years County Surveyor of Amador County, mostly engaged in mining surveying; have surveyed all the principal mines around Jackson and Sutter Creek; I know the property in controversy; have surveyed it and the underground workings. The line XY' represents the lode line; the lines 1 2, 2 3, 3 4 and 4 1 represent the exterior boundary lines. I made this map (referring to map marked Plaintiff's Exhibit 3) from field notes obtained from the Surveyor-General's office; it shows the underground workings. The lines connecting the letters A and B marked the 1250, 1350, 1500, 1600, 1700 levels. The shaft is an inclined shaft. The inclination of it from the horizontal is 71½ degrees. The first crosscut is at 112 feet measured on the incline; it is east 110 feet and there encounters a vein. There is another cross cut at 463 feet. At 489 feet the shaft comes against the hanging wall. There is a cross cut east on the 700 and 900 foot level. I have surveyed the 1250, the 1350, the 1500, the 1600 and 1700 levels, and they are correctly delineated on that map (Plaintiff's Exhibit 3). The pitch of the shaft is 9½ inches horizontal to 4 feet perpendicular.

131 At 412 feet down the shaft, it is 310 17/100 from the vertical line on Exhibit 4. At 524 76/100 feet on the incline, it is 165 89/100 feet from the vertical line. Station No. 4 is 424 76/100 feet on the incline and it is 165 89/100 feet from the vertical line. At the 700 foot level, it is 122 15/100 feet from the vertical line. At the 900 foot station it is 65 78/100 feet. At 1065 feet, it is 12 87/100 feet to the vertical line. The shaft crosses the vertical line at 1094 75/100 feet.

Referring to Exhibit 3, that is a correct representation as described in the patent. The vertical line in Exhibit 4 is a line drawn down

vertically, down through the east side lines of the Central Eureka Mine and the west line of the Toman Ranch. It is almost precisely 340 feet from the collar of the shaft. The shaft follows the hanging wall and you can see the hanging wall all the way from the 489 foot station. I made Exhibit No. 3 from the field notes I obtained from the Surveyor-General's office. I found the mound at the common corner of Sections 7, 8, 17 and 18. I found a bottle in the mound. I did not find the post marked 42 and 48; I did find the pine tree which was the witness tree to that corner. The map represents the land described in the patent.

Plaintiff here introduced a number of witnesses, who testified that they had examined the mining property of the plaintiff, de-
132 scribed in the complaint, and the underground workings thereof, and that there was a continuous vein or ledge, with a smooth continuous hanging wall on the east thereof, extending from the surface of plaintiff's mining ground at a point a short distance east of the shaft as delineated on Exhibit A, and being about the same as the lode line on Exhibit A, and extending downward to the depth of 2000 feet, and being as far down as the shaft at present extends. Some of the witnesses testified that the hanging wall of the ledge was the smoothest and most uniform hanging wall during its entire course that they had ever seen in any mine, and the same witnesses testified to a large experience in mining upon what is known as the "Mother Lode." What is known as the "Mother Lode" is a vein of mineralized rock extending across Amador County, upon which are located many mines. They also testified that the vein or ledge of the plaintiff is a part of the "Mother Lode" extending into the mines adjoining on the north and south. They further testified that the hanging wall of the vein was so smooth and uniform in its direction and pitch that it was used as the hanging wall of the shaft for working the mine. They also testified to the extent of the workings of the ledge both north and south of the shaft. They further testified that said vein or ledge had its apex within the surface boundaries of plaintiff's mine and said apex follows and is substantially the lode line as indicated on "Exhibit 3."

Plaintiff rested.

Counsel for Tomans then moved the Court for a non-suit upon the following grounds:

I. That the evidence does not show that the plaintiff at the
133 time of the commencement of this action was the owner of or had any interest in the property involved in this action.

II. That it is admitted by the pleadings that on the 31st day of December, 1898, and before the commencement of this action the plaintiff made, executed and delivered to the defendant a deed of all the property in controversy.

III. That the answer of defendant Toman set out a deed in *haec verba* executed by the plaintiff to Toman prior to the commencement

of this action. The genuineness and execution of such deed has not been denied by the plaintiff under Section 448 of the Code of Civil Procedure.

"The COURT: A motion for non-suit upon four grounds were presented to the Court before adjournment, which grounds were fully specified in the motion, based upon certain propositions. The first one: That the pleadings do not deny or raise the issue of title. I have examined the pleadings and am satisfied from that examination that the admission of title in the plaintiff's in the ground known as the Central Eureka Mine is sufficient for the purposes of a non-suit. Upon that ground the motion will be denied.

The second ground is that it is admitted by the pleadings that on the 31st day of December, 1898, or before the commencement
134 of this action the plaintiffs made, executed and delivered to the defendants a deed of all the property in controversy.

It seems to me that the proposition raised on this point as to the admission, execution and delivery of the deed, do not under Section 448 of the Code of Civil Procedure quoted by counsel go to the extent of admitting the due execution and delivery of a mining deed, or rather I should say, of a deed of a mining corporation, of its property. The ratification as I take it does not merely affect the execution of the delivery of the deed by the corporation or the proper officers of the corporation, and the resolution of its board of directors, but goes beyond to the ratification of the act itself.

The statute provides what must be done to constitute a ratification of the acts of the board of directors of a corporation in executing a deed or rather conveying any property of a mining corporation or purchasing any new property owned by the corporation. The object and purpose of this act being to protect the stockholders of a corporation. The corporation through its board of directors can buy no additional property any more than it can sell any portion of its property without the ratification of the acts of the board of directors. The statute does not go as I said before to the due execution of the
135 conveyance itself, and the admission under Section 448 would only apply to this deed to the extent as to whether it was properly executed or not within the provisions of that statute; that beyond that and in addition to that a ratification by the stockholders has to be shown.

Now this is attacked upon the ground that it is unconstitutional by the defendants. They claim that the law applicable to the ratification by the stockholders of a mining corporation is special legislation within the meaning of the law, and therefore void, citing authority on that point a decision of our Supreme Court in the 127 California, which has held that the third section of that Act of 1890 amended in 1897 is unconstitutional. The reason given in the decision for that ruling seems to me apparent upon its face, and it shows why it should not apply perhaps to the other sections of the act. The portion of the decision to which I have reference is as follows: (here the Judge read from the decision in 127 Cal.). In

the other respects it seems to me that there is a decided reason why mining corporations should be classified by themselves. That reason is that the primary object and purpose of a mining corporation is the extraction and reduction of minerals, the obtaining of gold therefrom; in other words the conduct of mining operations, and
136 not the purchasing or selling of property as in corporations for profit. Railroad corporations have been mentioned by counsel; their corporate property has a value upon its face, and their business is traffic. A merchandising corporation carries on a business the object of which is traffic and the value of its stock is apparent, but mining corporations have been the object of special enactments to protect the stockholders, and the reason for it is apparent to any one who has ever had any dealings with them from the fact that the value of mining property depends upon the discoveries of mineral made in the mine. These discoveries are made at times when the stockholders of the corporation know nothing about it, frequently they are far away from the place where the mine is located, so that they could obtain no knowledge of such discoveries and a complete transfer of its property might be obtained and frequently has been obtained and the property has passed from their hands into the hands of others contrary to the law of mining corporations in this state and for that reason the special enactment has been made, and for that reason in my judgment it is not class legislation and in no sense obnoxious to the constitution, but it refers to all in the one class of mining corporations and I don't think that the law is unconstitutional in that respect, still I will give
137 counsel an opportunity to test that if they are desirous by reserving their exception and taking it to a higher Court, and upon that ground also the motion will be denied.

Now I see as counsel for plaintiff argues that in addition to the deed set forth in haec verba in the answer of the defendants is an allegation as to the effect of that deed, which for all purposes under our rules of pleading is deemed denied, and it leaves it—as the motion does now rest upon the copy of the deed as set forth and its execution as I understand it admitted by the pleadings, it leaves it then that the defendants in this action attempt to show something from that deed which does not appear upon the face of the deed. It is an ordinary quitclaim deed carrying with it the common conditions that such instruments carry only with the additional clause to show that it is executed by resolution of the corporation, and there is nothing upon the face of the instrument itself, from its language to infer that anything more was passed by it than would be passed by any deed to such a piece of property. It seems to me then that the burden would rest upon the defendants to show that it does convey more than it appears upon its face to convey. For the reasons given the Court will deny the motion for a non-suit.

138 To which ruling the defendants duly excepted.

And the defendants admitted that—

Defendants admitted that the land shown on diagram (referring

to plaintiff's Exhibit 3) was patented to Hall McAllister and by regular mesne conveyances, the title thereto vested in the plaintiff and if any extra lateral right existed in Hall McAllister it was in the plaintiff, unless it was extinguished by, or passed to the Tomans by, the quit claim deed set out in the answer.

The defendants here introduced into evidence a certified copy of the patent record of the Summit Quartz Mine duly certified by the commissioner of the U. S. Land Office, and being similar to the patent record introduced in evidence by the plaintiff and hereinbefore set out.

Defendants here produced a book of the minutes of the Central Eureka Mining Company, which was admitted to be a Minute Book of the corporation plaintiff. Defendants then offered in evidence from page 114—115 the following:

"San Francisco, December 31, 1898.—The Board of Directors of the Central Eureka Mining Company met pursuant to call of
139 President and notices duly served. Present, Directors, De Golia, Gunn, and Grady. Absent, Directors, Keeney and Gilpin. Also Attorney J. J. Richardson. Minutes of last meeting read and on motion the same were ratified and confirmed. Director Grady reported that he had arranged with the Joshua Hendy Machine Works relative to the payment of the overdue note of $1000 as follows, $300.00 and the interest on the $1000 in cash, which had been paid and the note for the balance of the $700 payable March, 1892. The same was on motion ratified and confirmed. Mr. Richardson then stated the condition of the Toman bond and option, and the agreement he had made with the attorney of the Tomans under the former instructions received from the directors, and presented the following resolution as embodying the terms of said agreement.

'Whereas, Eliza A. Toman and James Toman, her husband, and 'the Central Eureka Mining Company have mutually agreed to can- 'cel that certain contract, bearing date October 23rd, 1897, and re- 'corded in the office of the county recorder of Amador County, Cali- 'fornia, in volme "G" of Agreements, page 211, and also that certain 'note for $1000 payable November 15, 1898, and whereas, in con-
'sideration of such cancellation this corporation has agreed to
140 'pay said Tomans the sum of one thousand ($1000) dollars,
'to be paid as follows: two hundred and fifty ($250) dollars, 'cash paid December 24th, 1898; seven hundred and fifty ($750.00) 'dollars on or before May 1st, 1898, to be evidenced by a promissory 'note for that amount which note shall be payable on its face one day 'after date:

'Resolved, that the President and Secretary of this corporation be, 'and they are hereby authorized and directed to make, execute and 'deliver to the said Eliza A. and James Toman on behalf of this cor- 'poration a quit claim deed of all the right, title and interest of the 'corporation in and to the real property described in said contract of 'sale, and particularly described as follows: All that real property

'situated in the County of Amador, State of California, and described
'as that portion of Sections Eight (8) and Seventeen (17) Township
'Six (6) North, Range Eleven (11) East Mt. Diablo Base and Me-
'ridian, lying north of the center of that certain wagon road extend-
'ing between the town of Ione and Volcano, and known as the
'Ione and Volcano Wagon road, and lying east of that certain pat-
'ented mining ground known as the Summit Quartz Mine, and also
'east of that certain patented mining ground known as the Amador
'Consolidated Mine, situate in the County of Amador, State
141 'of California, and also that portion of said Section Eight (8)
'and Seventeen (17) lying north of said wagon road and
'westerly of the westerly line of said Summit Quartz Mine. It is
'further resolved that the President and Secretary of this corpora-
'tion be, and they are hereby authorized and directed to make, ex-
'ecute and deliver to the said Eliza A. and James Toman the note
'of this corporation for seven hundred and fifty ($750) dollars, said
'note to be payable on its face one day after date. (The under-
'standing with said Tomans however being that it shall not be col-
'lected prior to May 1st, 1899, except that in the event that other
'creditors attach said corporation, and that any assessments that be-
'came due on the 2000 shares of stock held by said Tomans shall be
'endorsed on said note.) It is further resolved that the President
'and Secretary, or either of them, be and they are hereby authorized
'and instructed to take such steps as may be necessary in the prem-
'ises, severally or jointly with said Tomans for the purpose of with-
'drawing form the Bank of California, and delivering to the said
'Tomans the papers placed in escrow in said bank and referred to in
'said agreement of October 23, 1897. It is further resolved that the
'President and Secretary of this incorporation be and they are
'hereby authorized to sign, execute and deliver all proper and
142 'necessary papers requisite and necessary to cancel said con-
'tract, and to free the land and title of said Tomans from any
'incumbrance, which resolution was on motion duly seconded unani-
'mously adopted.'"

Whereupon plaintiff objected. We will make the objection now that the authority given to the Board of Directors to execute this deed in question did not authorize the conveyance of any part of the Central Eureka property, that it simply authorized the making of a quitclaim deed of the interests of the Central Eureka Mining Company in that part of the Toman Ranch lying east of the plaintiff's mine, and that the evidence if followed up with the execution of the deed in accordance with the authority here sought to be proven is not for any purpose relevant to this case. It does not show, or tend to show, any right or title in the defendants in this action to that part of the Central Eureka vein, which underlies the Toman rancho; upon the further ground that it is irrelevant, immaterial and incompetent, and upon the further ground that it appears upon the face of the resolution that the object of the deed authorized to be executed by this resolution was to free the Toman land from any lien upon it by rea-

son of any bond t
the plaintiff here
hat had been previously executed by the Tomans to
in.

The Co
143 fendant's
with the p
URT: Let it be formally admitted, marked as de-
exhibit 3. It is admitted subject to the objection
rivilege to make a motion hereafter to strike it out.
offers in evidence paper marked "Exhibit A" for
he words and figures following, to-wit:

Defendant here
identification, in
Whereas, Eliza
parties of the firs
poration, as party
1897, enter into
which, the said pa
second part, and t
parties of the first
California, and f
contract was rec
County, Decembe
211, *et seq.*:
A. Toman and James Toman, her husband, as
t part, and the Central Eureka Mining Co., a cor-
of the second part, did, on the 23rd day of October,
a contract and agreement of sale, by the terms of
rties of the first part agreed to sell to the party of the
he party of the second part agreed to buy from the
part, certain property situated in Amador County,
lly described and set out in said contract, which
orded in the Recorder's Office of said Amador
r 1st, 1897, in Volume G of Agreements at page

And whereas, t
December, 1898,
withdraw from s
nants ther
he parties to said Agreement, on the 23rd day of
or value, mutually agreed to annul and cancel and
aid contract, and all of the obligations and cove-
in:

144 And wh
of Directo
the President and
its corporate act
Eliza A. Toman
all their right, ti
property describe
ereas, in pursuance of such Agreement, the Board
s of said Central Eureka Mining Co. authorized
Secretary of said Corporation, on its behalf, and as
nd deed, to make, execute and deliver to the said
nd James Toman, a Quit Claim Deed, conveying
le and interest of said corporation in and to the
d in said contract:
ch deed has been executed.

And whereas s
Now therefore,
shares of stock i
names, do hereby
rectors and office
annulment of sai
making, executio
James Toman of
we, the undersigned, holders of the number of
the Central Eureka Mining Co. set opposite our
ratify and confirm the acts of the Board of Di-
s of said Corporation in executing the release and
d contract, and do hereby confirm and approve the
n and delivery to the said Eliza A. Toman and
said deed.

Wm. R. Thoma	
Morris Brinn	5000
Ray Brinn	4000
Estell Brinn	500
Annie E. Allen	500
Jackson Dennis	2000
J. E. Bawden	5000
L. Katz	1000
145 F. Canins	250
G. B. Mi	250
M. D. Nixon	500
9—447	1000

	E. C. Voorheis	5000	
	John Ross Jr.	1000	
	J. B. Richardson	3000	shares
	Henry P. Dalton	2500	shares
	J. S. Adams	5000	"
	Lemuel Williams	1000	"
	Charles R. Root	1500	"
	Thos. Lindsay	1800	"
	Harriet L. Nye	500	"
	Emma M. Nye	500	"
	Richard Jones	500	"
	Chas. Wagner	3700	"
	Chas. D. Bates	1000	"
	Chas. D. Bates by C. D. Bates Jr.	1000	"
	Geo. T. Burtchaell	1000	"
	F. L. Witmore	2500	"
	I. M. Witmore	1000	"
	Anna L. Witmore	100	
	B. T. Sherman	100	
	W. P. Wheeler	1500	
	Julia E. Steere	2000	
	Chas. E. Gillett	1000	
	W. Gilpin	2000	shares
	A. F. Guirre	2000	"
	John H. Grady	5000	"
	E. B. De Golia	3000	
146	W. A. Van Bokkelin	34500	
	James W. Keeney, M. D.	10000	
	G. M. Freeman, M. D.	1000	
	J. R. Stroud (Pledgee)	10000	
	Geo. Walcom	2000	
	Geo. C. Walcom	250	
	John Tait per Geo. Walcom	500	
	Florence E. Walcom	250	
	Val Schmitt	3000	
	P. Kirchhoffer	3625	
	G. F. Hanson	1000	shs
	T. F. Creighton	3000	"
	Margaret F. Crawford	1000	
	W. B. Coffey	1000	
	Mary Coffey	1000	
	Geo. E. McPherson	1000	
	C. W. Smith	18500	
	J. Munnier	2000	
	John C. & E. Coleman	43900	shares
	Peter Deane	2500	"
	Jno. Martin	4000	"
	Acton H. Clough	5000	shares
	John H. Dawson	2250	

E. d'Artenay	1000 shares
I. H. Folkers	3000 shares
Edward J. Pringle	5000
R. L. Cheney, Trustee	700
J. H. Spring	14000
John R. Tregloan	3000

147 STATE OF CALIFORNIA, *County of Amador, ss:*

On this Seventeenth day of April, in the year one thousand eight hundred and ninety-nine, before me, Jackson Dennis, a Notary Public in and for said Amador County, residing therein, duly commissioned and sworn, personally appeared W. R. Thomas, Morris Brinn, for himself and for Ray Brinn and Estelle Brinn, as their agent; J. E. Bawden, L. Katz for himself and for J. Corinson as his agent, G. B. Vicini, M. D. Nixon, E. C. Voorheis, John Ross, Jr., known to me to be the persons whose names are subscribed to the within instrument, and they acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand, and affixed my Official Seal, at my office in the said County of Amador, the day and year in this Certificate first above written.

[SEAL.] JACKSON DENNIS,
Notary Public in and for said Amador County,
State of California.

STATE OF CALIFORNIA, *County of Amador, ss:*

On this Seventeenth day of April, in the year one thousand eight hundred and ninety-nine, before me, W. H. Turner, a Notary Public in and for said Amador County, residing therein, duly com-
148 missioned and sworn, personally appeared Annie E. Allen and Jackson Dennis, known to me to be the persons whose names are subscribed to the within instrument and they acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand, and affixed my official seal, at my office in the said County of Amador, the day and year in this certificate first above written.

[SEAL.] JNO. H. TURNER,
Notary Public in and for said Amador County,
State of California.

STATE OF CALIFORNIA, *City and County of San Francisco, ss:*

On this 11th day of April, in the year one thousand eight hundred and ninety-nine, before me, Mark Lane, a Notary Public, in and for said City and County, residing therein, duly commissioned and sworn, personally appeared R. L. Cheney and J. H. Spring, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Fran-
149 cisco, the day and year in this certificate first above written.

[SEAL.] MARK LANE,

Notary Public in and for the City and County of San Francisco, State of California.

Crocker Building, 602 Market St. Tel. Main 1113.

Estate of John Tregloan, by John R. Tregloan, ex..... 5000
Grace S. Tregloan, by John R. Tregloan, attorney..... 1000

I, William A. M. Van Bokkelin, Secretary of the Central Eureka Mining Company, a corporation, do hereby certify that the persons signing the annexed three documents, being the consent of and ratification by the stockholders of the said Central Eureka Mining Company of the act of the Board of Directors in the releasing and annulling of the contract between said Company and Eliza A. and James Toman, dated October 23rd, 1897, and the execution and delivery of a deed to the property referred to in said contract to said Tomans covering eight pages—were at the time of their respective signatures stockholders of record in the Central Eureka Mining Company and that the number shares owned by them in excess of any that
150 may be duplicated is, in the aggregate, equal to and in excess of two-thirds of the entire issued or outstanding capital stock of said corporation which is three hundred and forty-five thousand and five hundred shares and the amount properly signed for being two hundred and forty-four thousand nine hundred and twenty-five shares.

In witness whereof I have hereunto set my hand & the corporate seal this 24th day of April, 1897.

[SEAL.] WM. A. M. VAN BOKKELIN.

(Ten-cent Internal Revenue Stamp, cancelled attached.)

STATE OF CALIFORNIA, *City and County of San Francisco,* ss:

On this 10th day of April, in the year one thousand eight hundred and ninety-nine, before me, Mark Lane, a Notary Public, in and for said city and county, residing therein, duly commissioned and sworn, personally appeared T. F. Creighton, P. Kirschoffer, W. Gilpin, A. F. Guirre, John H. O'Grady, E. B. De Golia, G. F. Hanson, W. A. M. Van Bokkelin, James W. Keeney, G. M. Freeman, J. R. Stroud, Pledgee, George Walcom, George C. Walcom, Florence E. Walcom, John Tait, Val Schmitt, Margaret F. Crawford, W. B. Coffey, Mary Coffey, George E. McPherson, C. W. Smith, J. Munnier, John
151 C. and E. Coleman, Peter Dean, Jno. Martin, Acton H. Clough, John H. Dawson, E. d'Artenay, J. H. Folkers and

Edward J. Pringle, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[SEAL.] MARK LANE,
Notary Public in and for the City and County of San Francisco, State of California.

Crocker Building, 602 Market St., Tel. Main 113.

STATE OF CALIFORNIA, *County of Alameda.*

On this eleventh day of April in the year One Thousand Eight Hundred and Ninety-nine, before me, E. Bernstein, a Notary Public in and for said County of Alameda, residing therein, duly commissioned and sworn, personally appeared J. R. Richardson, Henry P. Dalton, J. S. Adams, Lemuel Williams, Charles R. Root, Thomas Lindsay, Harriet L. Nye, Emma M. Nye, Richard Jones, Charles Wagner, Charles D. Bates, C. D. Bates, Jr., George T. Burtchell, J. L. Wetmore, I. M. Wetmore, Anna L. Wetmore, B. T.
152 Sherman, W. P. Wheeler, Julia E. Steere, Charles E. Gillett, known to me to be the persons described in, whose names are subscribed to, and who executed the within instrument, and they severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City of Oakland, County of Alameda, the day and year in this certificate first above written.

[SEAL.] E. BERNSTEIN,
Notary Public in and for said County of Alameda, State of California.

[Endorsed:] Consent of stockholders to annulment of contract to purchase, made with E. A. and Jas. Toman.

Filed for record at the request of Jas. Toman, May 5th, 1899, at 11 o'clock a. m. and recorded in Vol. "G" of Agreements, page 540, Amador County Records.

D. A. PATTERSON, *County Recorder.*
By —— ——, *Deputy Recorder.*

Central E. M. Co. *vs.* East Central E. M. Co.
Defendant's Exhibit "A" for identification.
Admitted as Defendant's Exhibit No. 4.

Filed October 17th, 1901.

C. L. CULBERT, *Clerk.*
By B. R. BREESE, *Deputy Clerk.*

153 Mr. OLNEY: I do not understand what the purport of this offer is, but we object to it on the ground that it is not a ratification of two-thirds of the stockholders of the Central Eureka Mining Company.

The COURT: The offer must be made for some purpose and that purpose should be presented to the Court at the time of offer.

Mr. OLNEY: We object to the introduction in evidence upon the ground that it is not a ratification of two-thirds of the stockholders of the Central Eureka Mining Company. I will specify the particulars in which the consent is not sufficient. The signatures are all right except those I will specially point out. Two thousand shares of the capital stock of the plaintiff corporation stood of record at the time in the name of George Allen who then was deceased, but the signature of the consent purports to be signed by Annie E. Allen; on the further ground that 500 shares of stock stood in the names of Ray Brinn and Estelle Brinn respectively. There is no acknowledgment as the statute requires of the signature of Ray Brinn and Estelle Brinn. 1000 shares of the stock stood of record in the name of C. D. Bates. C. D. Bates did not sign or acknowledge the ratification but the acknowledgment is by C. D. Bates, Jr. 5000 shares belong to Jackson Dennis, but he did not acknowledge his
154 signature to the ratification and I object to it on that ground. 28000 shares stood of record in the name of W. A. M. Van Bokkelen, trustee, in which he is the owner in his own right of only 4500 shares, and there was no authority for the signing of the ratification by Mr. Van Bokkelen of the other shares. 10,000 shares stood upon record in the name of J. R. Stroud as pledgee, and we object to that signature on the ground that a pledgee of stock has no right to sign any such ratification. 3000 shares stood in the name of J. R. Tregloan, but he did not acknowledge his signature to the ratification. 5000 shares belonged to John Tregloan, deceased, and while John Tregloan claimed the right to sign the name of the estate of John Tregloan to the ratification, he did not acknowledge such signature. 1000 shares stood of record in the name of Grace Tregloan, and the signature purports to be signed by her attorney, but is not acknowledged properly, not showing whether or no he was the attorney. 250 shares belonged to G. Coronson, but he did not acknowledge his signature, and 5000 shares of said stock stood of record as belonging to E. C. Voorheis as trustee, and said consent was signed by E. C. Voorheis as an individual.

I further object to this ratification that the certificate of the
155 Secretary called for by the statute is not attached to this ratification; it has not followed the statute. We further object to the introduction of this paper on the ground that it is irrelevant, immaterial and incompetent; that it purports to ratify the action of the Board of Directors of the plaintiff corporation in a matter which does not affect the property in controversy here in any manner whatever.

WILLIAM A. M. VAN BOKKELEN, sworn on behalf of defendant testified as follows: I had that paper in my possession as Secretary of the corporation. I delivered it to the clerk of the firm of Campbell, Metson & Campbell. The clerk of Mr. Metson brought this paper to me with this form of certificate (pointing to certificate) attached thereto, requesting me to go over the number of shares opposite the names of the different stockholders and find out how much they footed up, and then make the certificate, which I did, copying the certificate as sent by Mr. Metson to me, with the one exception that I found some shares were duplicated in the list, and so I put in a clause "Shares owned by them in excess of any that may be duplicated." That is my signature to the certificate.

At the time I made that certificate the facts stated in the certificate were true.

The signatures, the number of shares opposite to the several names with the exception of such as might be duplicated owing to the difference in dates on which the signatures were made were those standing against the respective names on the stock ledger. As the document had passed into the hands of the attorney of Mr. Toman, and the certificate had been prepared by him I did not investigate any acknowledgments or the rights of the different parties to sign, judging that that had been properly passed upon by the attorneys.

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With the exception of those that were duplicated, and then there were one or two signatures of parties owning stock in the names of other persons, and I deducted them from the list.

Admitted in evidence subject to a motion to strike out.

Defendants then offered in evidence from the Minute Book produced by the plaintiff. Minutes appearing on pages 145, 146, 147, in the words and figures following, to-wit:

"San Francisco, April 14, 1900. The annual meeting of the stockholders of the Central Eureka Mining Company was held at office 320 Sansome street, room 9, at 2 o'clock P. M., pursuant to call of the Board of Directors, and a notice published in the Evening Post a newspaper of general circulation published in San Francisco, for more than fifteen days, and notice is mailed to every stockholder. President Z. T. Gilpin called the meeting to order. He appointed Messrs. J. H. Spring and George Walton committee on proxies. On call of the roll there were found present in person 127,351 shares, represented by proxy 237,881 shares, not represented 33193 shares, total 398,424 shares. Committee on proxies offered the following which was unanimously adopted. Resolved that all proxies now presented be accepted as good for voting unless objected to by any stockholder. The Minutes of the stockholders' meeting of October 24th, 1898, and September 22, 1898, were read and on Motion approved. On motion duly seconded the following was unanimously adopted: Resolved that all transactions and acts of the Board of Directors of this corporation as the same are of record, be and the same are hereby approved, ratified and confirmed."

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Mr. VAN BOKKELEN: 398,424 was the total amount of stock issued by the Central Eureka Mining Company at that time and outstanding.

Plaintiff objected to the introduction of the minutes upon the ground that it is irrelevant, immaterial and incompetent in
158 this case; that the so-called ratification is not a ratification of the action of the Board of Directors taken nearly a year and a half previous to the date of this meeting, and it is not such a ratification as is called for and required by the provisions of the statute, and further that it purports to be a ratification of an action of the Board of Directors of plaintiff corporation touching a proposition that is not involved in this action.

Admitted subject to a motion to strike out.

Defendants then offered a portion of the minutes of the plaintiff of July 21st, 1899, on pages 123-124 as follows:

"The president stated that in an interview with Mr. James Toman it had developed that Mr. Toman claims that the Company has by recent deed conveyed to his wife and himself the triangular piece of land lying between the west boundary of the company's patented claim and the section line—the land acquired from Mrs. Howard. On motion the matter was referred to J. B. Richardson Esq., attorney at law for investigation, and report to the Board. The Secretary reported that he had interviewed Mr. James Toman, relative to removing his fence from the company's ground, and that Mr. Toman
159 had promised to remove the same before the first day of September as he could not get the necessary posts for a new fence before that time."

Plaintiff objected on the ground that it was entirely immaterial and irrelevant, and having no relation to this matter in controversy.

The COURT: Let it take the course of the other offers. Let it be admitted subject to a motion to strike out.

Plaintiff then offered and read in evidence a portion of the minutes of the corporation meeting held May 22nd, 1899, on page 122 of the minute book.

"Whereas it appears that one James Toman is occupying a portion of the land belonging to this Company, and has placed a fence around the same, therefore be it resolved that the Secretary be instructed to notify said Toman to vacate said land, and to remove said fence and all personal property belonging to him (Toman) off of the land of this Company, on or before the first day of August, 1899; if said Toman shall refuse or neglect to remove said fence and vacate said land before August the first A. D., 1899, that the Secretary shall cause such action to be taken towards the removing of said fence and causing said Toman to cease the occupancy of said land, as he may be advised to take in said matter by the attorney of the Company."

160 Plaintiffs objected as immaterial, irrelevant and incompetent, having no connection whatever with the matters in controversy in this action.

W. E. Downs, sworn on behalf of defendant testified as follows: I remember removing a fence from the ground of the Summit Quartz Mine property. I think it commenced at a point "A" on plaintiff's exhibit 3 and ended at point "B," then it ran in a direct line pretty nearly straight from "A" to "B." It was torn down and another fence built from point "A" to "3" and from "3" to the letter "C" in the word "Central."

The Court: That is on the east side line of the Central Eureka Mine?

A. Yes, on the east side line. The area between a line drawn from "3" to "A" to "B" to "D" was included in the Toman inclosure prior to the building of the fence.

Defendant then offered in evidence a deed in the words and figures following, to wit:

"This indenture, made this 31st day of December, A. D. one thousand eight hundred and ninety-eight, between the Central Eureka Mining Company (a corporation), the party of the first part,
161 and Eliza A. Toman and James Toman, her husband, of the County of Amador, State of California, the parties of the second part.

Witnesseth: That the said party of the first part, for and in consideration of the sum of ten dollars, gold coin of the United States of America, to it in hand paid by the parties of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and forever quitclaimed, and by these presents does remise, release and forever quitclaim unto the said parties of the second part, and to their heirs and assigns forever.

All those certain lots, pieces, or parcels of land situate, lying and being in the said County of Amador, State of California, and bounded and particularly described as follows, to wit:

First. That portion of Sections Eight (8) and Seventeen (17) Township Six (6) North, Range Eleven (11) East, Mount Diablo Base and Meridian, lying north of the center of that certain wagon road extending between the town of Ione and Volcano and known as the Ione and Volcano wagon road, and lying east of that certain patented mining ground known as the Summit Quartz Mine, and
162 also east of that certain patented mining ground known as the Amador Consolidated Mine.

Second. Commencing at the southwest corner of that certain patented claim known as the Summit Quartz Mine, situated in Township Six (6) North Range Eleven (11) East, Mount Diablo Meridian, in the County of Amador, State of California, said southwest corner being at or near the middle of that certain wagon road known as the Ione and Volcano wagon road, thence running in a southwesterly direction along the center of said Ione and Volcano wagon road a distance of eight and one-half chains more or less to the intersection of the section line between Sections Seventeen (17) and Eighteen (18),

in said Township, thence northerly along said section line extended a distance of eighteen and one-half chains more or less, to its intersection with the western boundary line of said Summit Quartz Mine, thence south along said boundary line, twenty-seven degrees, fifteen minutes east, fifteen chains more or less to the point of beginning; being a fractional portion of Lot Four (4) in S. W. one-quarter of said Section Eight (8) and a fractional portion of the N. W. one-quarter of the N. W. one-quarter of Section Seventeen (17) all of the land above described lying westerly of said Summit Quartz
163 Mine and northerly of the middle of said Ione and Volcano Road.

And does hereby remise and release unto the parties of the second part all claims and obligations, bonds and contracts, or assignments of either made by Eliza A. Toman or James Toman to said Central Eureka Mining Company, a corporation, or to any of its predecessors in interest, grantors or assignors, and does specially remise and quitclaim unto the said Eliza A. Toman and James Toman, and does hereby specially release them and each of them of and from any covenant or agreement contained in that certain agreement made and entered into between Eliza A. Toman and James Toman, and the Central Eureka Mining Company, a corporation, under date October 23rd, 1897, which said agreement was recorded at page 211 *et seq.*, Amador County Records, State of California.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances.

164 To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part, their heirs and assigns forever.

This deed is made pursuant to the authority and resolution of the Board of Directors of party of the first part, which resolution was adopted by said party of the first part at a meeting thereof, held December 31st, 1898.

In witness whereof, the said party of the first part hereunto set its hand and seal the day and year first above written.

THE CENTRAL EUREKA MINING COMPANY.
By Z. T. GILPIN, *President.*
By WM. A. M. VAN BOKKELEN, *Secretary.*

Signed, sealed and delivered in the presence of
J. B. RICHARDSON.
[SEAL OF COMPANY.]

STATE OF CALIFORNIA, *County of Alameda, ss:*

On this 25th day of March in the year of our Lord one thousand eight hundred and ninety-nine, before me, J. B. Richardson, a Notary Public in and for said county and state residing therein, duly commissioned and sworn, personally appeared Z. T. Gilpin, known to me to be the President and W. A. M. Van Bokkelen,
165 known to me to be the Secretary of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[SEAL.] J. B. RICHARDSON,
Notary Public in and for Alameda Co., Cal.

(Endorsed:) "Deed Central Eureka Mining Company to Eliza A. Toman and James Toman—Dated, December 31st, 1898.

Filed for record at the request of Jas. Toman May 5th, 1899, at 5 min. past 11 o'clock a. m. and recorded in Vol. "17" of Deeds page 643—Amador County Records.

D. A. PATTERSON,
County Recorder.

——— ———,
Deputy Recorder.

By fee $1.50."

Plaintiff objected to the introduction of this deed upon the following grounds. We object to the reception of this deed in evidence upon the ground that it appears from the face of the deed that it is irrelevant and immaterial to any controversy in this action, upon the further ground that it appears from the face of the deed that
166 none of the property described in the complaint in this action involved in this controversy is by any possible construction of this deed embraced within the property conveyed by the same; that the deed does not show or tend to show title in the defendants, or either of them, to any part of the vein in its downward course which has its apex with the mining ground of the Central Eureka Mining Company the plaintiff herein, in other words, the Central Eureka Mine embraces the surface area delineated upon the map of the plaintiff, marked Plaintiff's Ex. No. 3, heretofore introduced in evidence, and that the Central Eureka Mining Company is the owner of the vein or any vein which has its apex in its mining ground although in its downward course shall pass under the Toman Rancho, and that it appears upon the face of the instrument itself that no part of the surface of the Central Eureka Mining Company's ground, nor any vein which has its apex within said ground is conveyed by the said instrument.

Mr. OLNEY: We make the further objection that it does not

appear that the said instrument was properly ratified by at least ⅔ of the stockholders of the said corporation plaintiff, and that such ratification was not made as required by law in order to give validity to this deed.

The COURT: The decisions seem to be clear upon the point,
167 that a patent of the United States to a mining ground has as its object the granting of a vein, and sufficient surface ground for the convenient working thereof. That is the extent of it. The vein is granted no matter where it runs; that is the general supposition, and the holding of the surface ground is all the holding necessary. Now this deed does not upon its face purport to convey any portion of the mining ground of the Central Eureka Mining Company. It purports to convey by quit-claim deed the lands described on the face of the deed which lie east of the Central Eureka Mine, or the Summit Quartz Mine as patented. In addition to this it purports to release the plaintiff here from the obligation of contracts entered into between it and Eliza A. Toman and James Toman. That is all there is to it. *There is nothing in the deed that is not plain and clear. There is nothing in the language of it that I can find that is at all ambiguous, which would entitle the Court to admit outside evidence to explain its terms.* Of course that being so they could not be varied by such evidence, and that being the case, it seems to me that the court has no right to introduce in evidence a paper—permitting it to be introduced into evidence, that upon its face bears no relation to the case at all—to the property in controversy in this case. As I
168 have stated last night I have but one feeling in these matters where the Supreme Court has a chance to rectify the error I may make and that is a feeling of satisfaction that that is the case; that whatever errors if any that I may make, the parties have their remedy by an appeal. But I do not see looking at it from this standpoint and in the light of the reasons that I have given why I should encumber the record with it. I see no reason why I should admit this deed under the evidence before taking in consideration all the evidence that is in the case which leads up to it. The objection to the introduction of the deed will therefore be sustained.

To which ruling of the Court the defendant then and there excepted.

Thereupon the defendant rested.

The defendants specify the following particulars in which the evidence is insufficient to justify the decision:

I. The evidence is insufficient to justify the Finding: That "On the 25th day of November, 1873, the United States of America, by its letters patent, granted to one Hall McAllister all said Summit Quartz Mine hereinabove described, with the exclusive right of pos-
169 session and enjoyment of all the land included within the exterior lines as above described, and of 1165.56 linear feet of the said Summit Quartz Mine, vein, ledge, lode or deposit, for such length throughout its entire depth, although it enters the land adjoining, and also of all other veins, lodes, ledges or deposits

throughout their entire depth, the tops or apices of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from the perpendicular as to extend outside the vertical side lines of said survey, but limiting the right of possession to such outside parts of said veins or ledges within such portions thereof as lie between vertical planes drawn downward through the end lines of above described premises continued in their own direction," in this that the evidence shows that the end lines of the Summit Quartz Mine as patented to Hall McAllister were not parallel, and the evidence further shows that the patentee under the patent to the Summit Quartz Mine had no right to pursue any vein lode, ledge or deposit beyond the exterior boundary lines of said Summit Quartz Mine extended downward vertically.

II. The evidence is insufficient to justify the finding that by the letters patent to the Summit Quartz Mine issued to Hall Mc-
170 Allister there was granted to him the right to pursue, or the right to any vein beyond the exterior boundary line of said Summit Quartz Mine extended downward vertically, in this: That the evidence shows that the end lines of said Summit Quartz Mine were not parallel, and that said patent was issued under the laws of the United States adopted May 10th, 1872, to-wit: "An act to promote the development of the mining resources of the United States," which act required that the end lines should be parallel.

III. The evidence is insufficient to justify the finding that the patent to the Summit Quartz Mine was issued in pursuance of and in conformity with the Revised Statutes of the United States, Title 32, Chapter VI, in this: That the evidence shows that the said patent to Hall McAllister was issued under and in pursuance of the Act approved May, 1872, entitled, "An Act to promote the development of the mining resources of the United States."

IV. The evidence is insufficient to sustain the finding that the patent of the Summit Quartz Mine issued to Hall McAllister was issued upon application made by him on the 7th day of February, 1871, in this: That the evidence shows that the said patent was issued to him under an application made on the 11th day of October, 1872.

171 V. The evidence is insufficient to show that the application of Hall McAllister was based upon two locations of the Summit Quartz Mine, one made on the 26th day of March, 1863, for the Northerly 780 feet of said lode, vein or ledge, and the other made June 22nd, 1865, for the remainder of said vein, lode or ledge, in this: That there is no evidence showing, or tending to show, any locations of said Summit Quartz Mine, or any part thereof.

VI. The evidence is insufficient to justify the finding that the title of the defendants to the premises known as the "Toman Ranch" is derived from two patents issued by the Government of the United States to the predecessors in interest of the defendants. One patent was issued December 1st, 1876, and the other August 20th, 1878,

and both were made under the laws of the United States providing for the sale and disposition of what is known as "agricultural lands," in this: That there is no evidence showing or tending to show under what patents the defendants are the owners of the Toman Ranch, or under what title, or when patents were issued to the lands known as the Toman Ranch.

VII. The evidence is insufficient to sustain the finding that "both said patents contained a limitation upon the estate granted by the United States, giving the right to the proprietor of a vein or
172 ledge to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted" in this: That there is no evidence showing, or tending to show, said facts.

VIII. The evidence is insufficient to sustain that portion of the finding "That the diagram attached shows that the course of apex of said Summit vein through said Summit Quartz Mining claim referred to in the finding," in this: That there is no evidence showing the course of the apex as shown upon said diagram.

IX. The evidence is insufficient to sustain the finding "Within the said 'Summit Quartz Mine' is a certain vein, lode and ledge of quartz and rock in place carrying gold and other valuable minerals, which said vein, lode and ledge has its top or apex wholly within the surface lines of said Summit Quartz Mine extended downward vertically," in this: That there is no evidence tending to show that the vein, lode or ledge has its top or apex wholly within the surface lines of the Summit Quartz Mine extended downward vertically.

X. The evidence is insufficient to sustain the finding "In its course it crosses both the Northern and Southerly end of lines of said mining ground above described. On the North it crosses the end line at a point marked on the diagram 'Exhibit A' as
173 '42 and 48,' and being the beginning point of the description hereinabove set out. It crosses the Southern end line at a point marked on the diagram 'Exhibit A' as '48' and being 2 chains and 41 links from Southeast corner of said patented mining ground," in this: That there is no evidence to show that any vein crosses the Northerly or Southerly end of the mining ground described in the findings, at any point, or at the point designated in said findings.

XI. The evidence is insufficient to sustain the Finding "Ever since the said 22nd day of June, 1865, the plaintiff and its predecessors in title, and grantors, have been, and plaintiff was at the beginning of this suit, and now is, in the exclusive, open, notorious and adverse possession of all said Summit Quartz Mine, including the vein, lode or ledge above described, throughout its entire depth to the extent of 1165.56 linear feet longitudinally along its course, with the right to follow the said vein, lode or ledge in its descent or downward course to any depth in the direction of the dip or downward course of said vein, lode or ledge, and since the issuance of said patent on the 25th day of November, 1873, this plaintiff and its

grantors have been the owners in fee of said Summit Quartz Mine, including said vein, lode or ledge," in this: that there is no evidence showing that the plaintiff on the 22nd day of June, 1865, or
174 its predecessors in title, or grantors, or at any time prior to 1871 were in the possession of any or all of the Summit Quartz Mine. Or that they were in the possession of it with the right to follow the vein, lode or ledge in its descent or downward course in the direction of the dip beyond the said lines in said Summit Quartz Mine extended downward vertically.

XII. The evidence is insufficient to justify the Finding "That the defendants in this action have no right, title or interest in, or claim to, any part or portion of said vein, lode or ledge hereinbefore described, or of any vein or lode or ledge which has its top or apex within said Summit Quartz Mine, and which in its downward course enters, extends into, penetrates, or underlies the premises known as the "Toman Ranch" and described in the complaint herein," in this: That there is no evidence to sustain said finding, on the contrary, the evidence shows that the defendants have the right to all veins, lodes or ledges within the exterior boundaries of the Toman Ranch and east of the east side line of the Summit Quartz Mine.

XIII. The evidence is insufficient to sustain the Finding "Prior to the acquisition of title from the United States by the defendants and their grantors to the land and premises known as the "Toman
175 Ranch" the title to the said veins, lodes and ledges having apices in the said Summit Quartz Mine and extending into and underlying the surface of said premises known as the "Toman Ranch," had been and was severed from the title to said surface and had been granted and conveyed by the United States as aforesaid to the grantors of plaintiff under and in pursuance of the laws of the United States regulating the sale and disposal of mineral lands of the public domain" in this: that there is no evidence to sustain said finding.

XIV. The evidence is insufficient to sustain the Finding "The ownership, possession, or right of possession, of defendants and their grantors in and to the premises known as the 'Toman Ranch' and to each and every portion thereof, are and at all times were subject to the rights and interests of this plaintiff in and to said veins, lodes or ledges hereinbefore described" in this: that there is no evidence showing that the rights of the defendants in the premises known as the Toman Ranch are subject to the rights and interest of the plaintiff in any vein, lode or ledge; but, the evidence, on the contrary shows that the defendants are entitled to all veins, lodes or ledges within the exterior boundary lines of the Toman Ranch.

XV. The evidence is insufficient to justify the Finding that
176 the plaintiffs have sunk an inclined shaft upon any ledge having its top or apex within the Summit Quartz Mine, in this: That there is no evidence that any ledge has its top or apex within the Summit Quartz Mine.

XVI. The evidence is insufficient to sustain the Finding "All the

ore, mineral deposit, lodes, veins or ledges heretofore or now cut, exposed, open, worked or appropiated by means of said underground works of plaintiff, or by plaintiff in the course of such working and mining underneath the premises described as the 'Toman Ranch' are parts of such ledge having its top or apex wholly within the boundaries of said Summit Quartz Mine and within the end lines of said mine projected in their own direction, and were and are the properties of the plaintiff, and neither the defendants, nor anyone else from whom they claim title, ever owned or held any interest therein whatsoever," in this: that there is no evidence that any ledge, vein or deposit underneath the premises described as the Toman Ranch are part of any ledge having its top or apex within the boundary line of the Summit Quartz Mine. Nor is there any evidence showing that any vein or ledge underneath the land described as the Toman Ranch
177 are the properties of the plaintiff, but, on the contrary, the evidence shows that the same are the properties of the defendants.

XVII. The evidence is insufficient to sustain the finding "Said lode, ledge or vein, having its top or apex as aforesaid within the boundaries of the Summit Quartz Mine, contains mineralized ore of great value and the sole business of said plaintiff is the working of said vein and extracting therefrom the gold and other valuable minerals therein contained," in this, there is no evidence showing, or tending to show that there is any vein having its apex within the exterior boundaries of the Summit Quartz Mine.

XVIII. The evidence is insufficient to sustain the finding "The deed dated December 31st, 1898, and set out in *haec verba* in the respective answers of the defendants herein, does not include any portion of the said mine described in the letters patent from the United States to Hall McAllister hereinabove referred to, nor does it include any vein, lode or ledge having its apex within the exterior boundaries of the said mine as described in said patent and hereinbefore described," in this: that the evidence shows that the premises described in the deed, dated December 31st, 1898, does include all veins, lodes or ledges and all mineral within the exterior boundary line of the Toman Ranch extended downward vertically, whether the same has its apex within or without the exterior boundaries of the Sum-
178 mit Quartz Mine, or wherever the same may have its exterior boundaries; and in this: that the said deed includes all the vein, lode or ledge described in plaintiff's complaint which is within the exterior boundary lines of the land known as the Toman Ranch extended vertically downward and being east of the east side line of the Summit Quartz Mine.

The evidence is insufficient to sustain the finding that "All the denials contained in said answer of the defendants and each of them are untrue in this:

a. The evidence shows that the plaintiffs were never the owners or entitled to the possession of any vein, lode or ledge east of the east

side line of the mining ground known as the Summit Quartz Mine and described in the findings.

b. The evidence shows that the plaintiff never had the right to pursue any vein, lode or ledge beyond the exterior boundaries of the mining ground known as the Summit Quartz Mine described in the findings.

c. The pleadings show that the plaintiff on the 31st day of December, 1898, conveyed all interest it had, if any, in any property east of the east side line of the Summit Quartz Mine described
179 in the findings.

d. That the evidence shows that the plaintiff never did have the right to pursue any vein or lode under the land and premises known as the Toman land.

e. The evidence shows that if the plaintiff ever did have any right to pursue any vein under the lands known as the Toman Ranch that interest was conveyed by the deed made by the plaintiff to the Tomans set forth in the answer of the defendants herein.

f. The evidence shows that all veins, lodes or ledges within the ground known as the Toman land and which land is east of the Summit Quartz Mine belong to and are owned by the defendants Tomans, and that the plaintiff has no interest therein.

g. The evidence shows that the premises known as the Toman Ranch are not subject to any right or interest of the plaintiff.

Errors of Law.

The defendant specify the following errors of law committed at the trial and excepted to by the defendants:

The Court erred in sustaining the objection of the plaintiff's counsel to the introduction of the deed in evidence dated the
180 31st day of December, 1898, and made by the plaintiff to James and Eliza A. Toman.

And because said several matters and exceptions herein in this bill of exceptions stated do not appear of record herein; the defendants now appear in open Court and in the presence of the attorneys for the plaintiff, and within the time allowed by law after the entry of the judgment, and the further time granted by the parties, presents and tenders to this Court this bill of exceptions which defendants pray may be accepted and signed and sealed and made a part of the record herein. All of which is done according to law and the same is hereby settled and allowed this 13 day of June, 1902.

R. C. RUST, *Judge.*

[Endorsed:] Filed June 13th, 1902. C. L. Culbert, clerk. By J. R. Huberty, deputy clerk.

[Title of Court and Cause.]

Notice of Appeal from Judgment.

Take notice that the defendants, James Toman and Eliza A. Toman, in the above entitled action hereby appeal to the
181 Supreme Court of the State of California from the judgment therein given, made and entered in said Superior Court on the 6th day of November, 1901, in favor of the plaintiff in said action and against said defendants, and from the whole thereof.

Dated May 3rd, 1902.

CAMPBELL, METSON AND CAMPBELL,
Attorneys for Appellants.

To the Clerk of said Superior Court, to Messrs. Olney & Olney, W. J. McGee, Esq., and C. H. Lindley, Esq., Attorneys for Respondents.

Service of the foregoing notice of appeal admitted this 3rd day of May, 1902.

OLNEY & OLNEY,
Attorneys for Plaintiff.
W. J. McGEE,
C. H. LINDLEY,
Of Counsel.

Filed May 5th, 1902.

C. L. CULBERT, *Clerk.*

[Title of Court and Cause.]

Order Submitting and Denying Motion for New Trial.

Stipulation of counsel for an order of submission of motion for new trial was filed in open Court. Pursuant to stipulation
182 of counsel for all the parties litigant in the above entitled action, filed in open Court this day, the Court made the following minute order:

The motion of the defendants for a new trial in the above entitled action, coming on to be heard, the said defendants moved for a new trial of said cause and thereupon offered and read on said motion the judgment roll, the bill of exceptions and their notice of intention to move for a new trial, thereupon the said cause was submitted to the Court for its decision thereon. The Court thereupon made the following order: Defendants' motion for a new trial of the above entitled action having been heretofore submitted to the Court for its decision, and the Court being fully advised in the premises it is ordered that the said motion be and the same is hereby denied.

Done in open Court.

June 14th, 1902.

R. C. RUST, *Judge.*

[Endorsed:] Filed June 14th, 1902. C. L. Culbert, clerk. By J. R. Huberty, deputy clerk.

Recorded on the 14th day of June, 1902, in Book 10, page 424, of Minutes and Orders, Civil and Criminal, Amador County.

183 [Title of Court and Cause.]

Notice of Appeal from Order Denying New Trial.

Take notice that the defendants James Toman and Eliza A. Toman in the above entitled action hereby appeal to the Supreme Court of the State of California from the order of said Superior Court denying defendants' motion for a new trial given, made and entered in said Superior Court on the 14th day of June, 1902, and in favor of the plaintiffs in said action and against said defendants, and from the whole of said order.

Dated June 28th, 1902.

CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendants James Toman and Eliza A. Toman.
GALPIN & BOLTON,
Of Counsel for said Defendants.

To the Clerk of said Court, Messrs. Olney & Olney, Attorneys for Plaintiff, W. J. McGee, Esq., and C. H. Lindley, Esq., of Counsel for Plaintiff, and Messrs. Rodgers, Paterson & Slack, Attorneys for the Defendant East Central Eureka Mining Company.

Service of the foregoing notice of appeal from order denying
184 motion for a new trial and receipt of copy thereof admitted this 1st day of July, 1902.

OLNEY & OLNEY,
Attorneys for Plaintiff.
W. J. McGEE,
C. H. LINDLEY, *Of Counsel.*
RODGERS, PATERSON & SLACK,
Attys. for Dft. East Central Eureka M. Co.

[Endorsed:] Filed July 7th, 1902. C. L. Culbert, clerk.

Stipulation to Transcript.

It is hereby stipulated and agreed that the foregoing transcript is true and correct; that the said transcript on appeal contains true and correct copies of all the papers therein set forth now on file in the office of the County Clerk of the County of Amador, State of California, with the order therein made and entered on the minutes, and that the same may be used on both the appeals or on either.

It is further stipulated and agreed that an undertaking on
185 each of the said appeals in due form of law, has been properly filed in said cause.

Dated August, 1902.

OLNEY & OLNEY,
Attorneys for Plaintiff and Respondent.
W. J. McGEE AND
C. H. LINDLEY,
Of Counsel for said Plaintiff and Respondent.
RODGERS, PATERSON & SLACK,
Attorneys for East Central Eureka Mining Company, Defendant and Respondent.
CAMPBELL, METSON & CAMPBELL,
Attorneys for James and Eliza A. Toman, Defendants and Appellants.
GALPIN & BOLTON,
Of Counsel for said Appellants.

Clerk's Certificate to Transcript.

I, C. L. Culbert, County Clerk of the County of Amador, State of California, and *ex-officio* Clerk of the Superior Court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers in the above entitled action, now on file in my office, and with the orders therein made and entered on the minutes of said Court, and that the said papers and orders
186–190 therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof. That the erasures and interlineations were made before certifying hereto.

I further certify that a sufficient undertaking on each of said appeals in due form of law, was properly filed in said cause.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court this — day of ——, 1902.

[SEAL.]

C. L. CULBERT, *Clerk*,
By —— ——, *Deputy Clerk*.

191 **Copy.**

In the Supreme Court of the State of California.

Sac. No. 1095.

Dept. One.

CENTRAL EUREKA MINING CO., Respo.,
vs.
EAST CENTRAL EUREKA MINING CO., App.

On Appeal From the Superior Court in and for the County of Amador.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Angellotti J.

We concur, Shaw J, Van Dyke J.

Whereupon, it is ordered, adjudged and decreed by the Court that the judgment and order of the Superior Court in and for the County of Amador in the above entitled cause, be and the same are hereby affirmed.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 1st day of February, 1905, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 15th day of September, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

192 [Endorsed:] Sac. No. 1095. In the Supreme Court, State of California. Remittitur. Central Eureka Mining Co., Respo., *vs.* East Central Eureka Mining Co., App. Clerk's costs $—. Paid by Appellant, $—. Paid by Respondent, $—. Total $—. Frank C. Jordan, clerk. By —— ——, Deputy.

193 & 194 *Opinion.*

Department One.

Sac. No. 1095.

CENTRAL EUREKA MINING COMPANY (a Corporation), Plaintiff and Respondent,

v.

THE EAST CENTRAL EUREKA MINING COMPANY (a Corporation), Defendant, JAMES TOMAN and ELIZA A. TOMAN, Defendants and Appellants.

Defendants Toman appeal from a judgment quieting plaintiff's title to certain mining property, and from an order denying their motion for a new trial. The plaintiff is the owner of the Summit quartz mine, situated in Amador County, and the controversy here is as to so much of the vein of ore having its apex within the surface lines of plaintiff's location as lies within vertical planes drawn through the end lines of such location and those lines produced in their own direction, and underneath the surface of defendants' land. This vein, at the apex, traverses plaintiff's location, crossing both the southern and northern end lines. In its downward course the vein descends into the earth at an angle approximately of 65 deg. eastwardly, and on such downward course passes outside of a plane drawn down vertically through the east side line of plaintiff's surface location, and enters the adjoining land of defendants at a depth of 1,094 feet from the collar of plaintiff's shaft, and ex-
195 & 196 tends for a considerable distance therein. Plaintiff has already sunk its shaft to a depth of about 2,000 feet, and was at the time of the commencement of this action engaged in removing the ore and mineral-bearing rock from said vein at such depth of about 2,000 feet. The end lines of plaintiff's claim are not parallel, but converge in the direction of the dip of the vein.

Plaintiff's title to the Summit quartz mine is derived from Hall McAllister, the patentee from the United States. The patent was issued November 25, 1873, and the final entry and payment were made on October 11, 1872, several months after the passage of the Act of Congress of May 10, 1872, relative to the promotion of the development of the mining resources of the United States. The application for the patent, based upon two locations made in the years 1863 and 1865, respectively, was filed on February 7, 1871, while the act of July 26, 1866, commonly known as the "Lode and Water Law," was in force, and was pending on May 10, 1872, awaiting the approval by the surveyor-general of the survey which had already been made and submitted for approval. The patent subsequently issued upon said application purported to grant to the patentee the mining premises described therein, with the exclusive right of possession and en-

joyment of 1,165.56/100 linear feet of said vein (the length thereof on the apex between plaintiff's end lines) throughout its entire depth, although it might enter the land adjoining, providing that the right of possession thereby granted to any portion of the vein outside of the vertical side lines of the survey should be confined to such portions thereof as lay between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of such vein. The patent recites that the proceedings were had in pursuance of the Act of July 26, 1866, the Act amendatory thereof approved July 9, 1870, and the Act of May 10, 1872, and that the patent is issued in conformity with said acts. The defendants own the adjoining land known as the "Toman Ranch;" their title being derived through mesne conveyances from patents issued under the laws of the United States providing for the sale and disposition of agricultural lands, which patents were junior in point of time to the patent for the Summit quartz mine, and contained a reservation giving the right to the proprietor "of a vein or ledge to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted."

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It will be seen from the foregoing that the mining patent purported, upon its face, to grant to plaintiff's predecessor all that portion of the vein of ore which is here in controversy. Defendants contend, however, that notwithstanding the attempted conveyance, in terms, of the property in dispute, the patent failed to convey any extra lateral rights, by reason of the fact that the end lines of plaintiff's claim, as located, surveyed and granted, were not parallel, as required by the Act of May 10, 1872.

It appears to be recognized by the authorities that compliance with the requirement of the Act of May 10, 1872, that the end lines shall be parallel, is essential to the existance of any right in the locator or patentee to follow his vein outside of the vertical planes down through the side lines, in all cases where the location was made under such act. Iron S. M. Co. *v.* Elgin, M. & S. Co., 118 U. S. 196; Del Monte M. & M. Co. *v.* Last Chance M. & M. Co., 171 U. S. 55; Argonaut M. Co. *v.* Kennedy M. & M. Co., 131 Cal. 15, 25.

Plaintiff urges that as the only object of such requirement was to prevent the locator, in following his vein downward, from acquiring a greater length underneath the surface than he had apex at the surface, a grant of extralateral rights within converging end line planes, as in this case, would be within the spirit and intent of the Act of 1872, and therefore valid. This view is opposed to statements made in the opinions in the cases last cited, which appear to incline to the conclusion that extralateral rights are granted under the Act of 1872 only when the end lines are parallel. However, it is unnecessary to definitely decide this point in this case, for we are satisfied that as the locations upon which the patent was based were made prior to May 10, 1872, the requirements

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as to parallelism of end lines was not applicable thereto. It was not until the passage of the Act of 1872 that there was any such requirement, and it is not disputed that, had the patent issued prior to the passage of such act, it would have conveyed the extralateral right between the converging end planes. While the Act of May 10, 1872, repealed the previous statutes regarding the location and patenting of mining claims of the character here involved, the framers thereof were very careful to manifest their intention that existing rights should not be affected by such repeal. By section 2322, Rev. St.—one of the sections of said act—it was declared that "the locators of all mining locations heretofore made * * * so long as they comply with the laws of the United States, and with State, territorial and local regulations not in conflict therewith, shall have the exclusive right of possession and enjoyment of all the surface; included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations," provided that their right of possession to such outside parts of such veins shall be confined between vertical planes drawn downward through the end lines of their locations, continued in their own direction. It was further expressly provided in the act that "such repeal shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the General Land Office, but in such cases, where 201 & 202 adverse rights are not affected thereby, patents may issue in pursuance of the provision of this act." And further: "Nor shall this act affect any right acquired under said act" (the Act of 1866). And still further: "Provided that nothing contained in this act shall be construed to impair in any way rights or interests in mining property acquired under existing laws." In the face of such provisions, it cannot be held that it was the intention of Congress to deprive a previous locator, by any new requirement, of any existing right, unless such intention is very clearly manifested. So far as the particular requirement as to parallelism of end lines is concerned, it would appear to be well settled that it has no application to locations made prior to the Act of May 10, 1872. The objection of want of parallelism in end lines, where the patent was issued subsequent to the passage of said act, based upon locations made prior thereto, has been several times disposed of by the simple statement that when the locations were made there was no law requiring such parallelism. See Carson City H. & S. M. Co. *v.* North Star M. Co. (C. C.) 73 Fed. 597, 599; 83 Fed. 658, 669. In Iron S. M. Co. v. Elgin M. & S. Co., 118 U. S. 196, 208, the Supreme Court of the United States said, in effect, that a locator under the Act of 1866 has in such a case extralateral right, notwithstanding the lack of parallelism. The question was fully considered and definitely decided by this court in favor of such right in Argonaut Min. Co. *v.*

Kennedy M. & M. Co., *supra*. It was said therein that it would have been competent for Congress, in the law of 1872, to have required parties who had equitable rights to patents, to have made their end lines parallel before a patent issued, on pain of losing all extralateral rights, but there were no such provisions in the Act of 1872, and that the rights of locators under former laws were by said act expressly confirmed to them. The extralateral right was in that case confirmed, although the end lines diverged; it being held that it could be determined, as matter of law, from the patent, what
203 & 204 portion of the vein between those lines, not exceeding at any depth the stated number of linear feet at the apex, was conveyed. Where the end lines converge, as in this case, there can, of course, be no question as to the definiteness of the description of the extralateral right conveyed. By reason of such converging, the patentee is confined, within well-defined boundaries, to less on the dip below the surface than he had upon the surface.

It is sought to distinguish this case from the Argonaut Case, and other cases relied on by plaintiff, by showing them in all these cases the applicant for a patent had made his application, and paid his money thereon, prior to the passage of the Act of May 10, 1872, and thereby had acquired an equity susceptible of enforcement against the government, while in the case at bar, although the locations and application for a patent had been made prior to May 10, 1872, the payment was not made or the survey finally approved by the surveyor general until after that date. We find nothing in the report of the case of Carson City *v.* North Star, etc., Co., *supra,* showing that the money had been paid prior to May 10, 1872, and, so far as appears therein, the case was an exact parallel to this case. We are, however, of the opinion that the distinction alleged is not at all material. We are not concerned here with the question as to how far a locator must have proceeded with his claim, to put it beyond the power of the government to interfere with him in the enjoyment of the same. As we read the Act of 1872, it seems very clear that it was the intention of Congress to preserve to the prior locator everything that his location would have given him, had the Act of 1872 not been enacted, except possibly the width of the claim on the surface. See Lakin *v.* Roberts, 54 Fed. 461.

We have already referred to the various provisions upon this subject contained in the Act of 1872, and it is unnecessary to here restate them. The rights sought by the act to be pre-
205 & 206 served were such rights as had been acquired under the prior acts, by the making of a valid location, even though those rights were not of such a nature that the government might not, if it had seen fit so to do, deprive the locator thereof; and the right to obtain a patent in accordance therewith under the provisions of the Act of 1872 was given for the reason that the previous laws as to the issuance of such patents were repealed, and there was no other law under which a patent could be issued for any such mining claim. It was left to the Land Department to determine,

as to any such alleged prior location, what the rights of the locator were under the previous acts, and in accordance with the procedure laid down by the Act of 1872, to issue a patent conveying the title to the Government, so far as might be necessary to effectuate such rights.

The patentee did not waive or renounce any extralateral right by the acceptance of the patent. It is true that the patent did, in accordance with the express provisions of the Act of 1872, purport to grant, in addition to the vein or lode originally located, the right to all other veins or lodes, the top or apex of which lay inside of the surface lines of the location extended downward vertically, to their entire depth, although in the course downward they extended outside the vertical side lines. It might, perhaps, be contended with some force that as to the other veins and lodes, which were not embraced within the original location, and the right to which was for the first time given by the Act of 1872, the requirement, as to parallelism of end lines might preclude any extralateral right. But the patent, in terms, also purported to grant the 1165.56 linear feet of the original vein, throughout its entire depth, between the end lines continued in their own direction. By the acceptance of such a patent, there was no indication of any intent to waive or renounce any right to follow the vein, between the end lines, given by the original location, for those rights were expressly confirmed thereby, and plaintiff bases its claim entirely thereon. We cannot see that the legal effect of such an acceptance was a waiver or renouncing of any such right. These particular rights the patentee was entitled to, even though his end lines were not parallel, and the fact that the patent purported to also grant something else to which he may not have been entitled cannot affect his rights as to the original vein, which are also confirmed by the patent. It is true that the patent recites on its face that it is issued in pursuance of the Act of 1872, but it also recites that it is issued in pursuance of the Act of July 26, 1866, and the act amendatory thereof, approved July 9, 1870, and, in conjunction with the public records in evidence, shows that it was issued upon locations made prior to May 10, 1872, and upon an application pending at that date.

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The decision in the case of New Dunderberg *v.* Old, 79 Fed. Rep. 598, relied upon by appellant, does not sustain their claim. The Dunderberg owners claimed the right to follow their vein on its course or strike outside of and beyond their patented boundaries, and into a prior claim (the Frostberg). They claimed that they had this right under the claim of 1866, but they had so located their claim on the surface that the lode crossed both side lines of the claim diagonally on its strike, and passed out of the claim more than 300 feet before it entered the Frostberg claim, and had accepted a patent for this location. This patent did not purport to grant the extralateral right alleged, and could not, under the law, grant it upon the surface location, which had to be made under either act, for under both acts the locator was confined, in following the strike of his vein,

within the surface boundaries he had himself defined. To include the extralateral right sought in that case, it was necessary for the Dunderberg owners to go beyond their location, entry, and patent, and claim something not embraced therein at all. It was in regard to such a case that the Circuit Court of Appeals said that the claimant was bound by his own location, entry and application, and a patent in accordance therewith, and that his location and entry
209 & 210 for a patent was a notice of abandonment of everything not included therein. It was said: "A claimant who discovered and located a lode mining claim under the Act of 1866 renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he located it upon the surface of the ground, enters it, and accepts a patent for it under the Act of May 10, 1872." Since the side lines of the Dunderberg claim crossed the course of the strike of the vein, they were held to constitute end lines, and it was held that, under the express terms of the patent, the owner of the claim was without right to the possession of the lode outside of those lines after he obtained his patent. This case is in no way applicable here.

A question is raised as to the effect upon plaintiff's extralateral right to a quitclaim deed made by plaintiff to the defendants Toman on December 31, 1898. By this deed, plaintiff purported to remise, release, and forever quitclaim unto the Tomans "All those certain lots, pieces, or parcels of land situate, lying and being in the said County of Amador, State of California, and bounded and particularly described as follows, to-wit: First, That portion of Sections Eight (8) and Seventeen (17) Township Six (6) North Range Eleven (11) East, Mount Diablo Base and Meridian, lying north of the center of that certain wagon road extending between the towns of Ione and Volcano and known as the Ione and Volcano wagon road, and lying east of that certain patented mining ground known as the Summit Quartz Mine, and also east of that certain patented mining ground known as the Amador Consolidated Mine." The second parcel described lay to the west of the Summit Quartz Mine, and is in no way here involved. By this deed the plaintiff further purported to remise and release the Tomans from all
211 & 212 claim, bonds, and contracts made by the Tomans to it or its predecessors, and specially from any covenant contained in any agreement between the parties dated October 23, 1897, and duly recorded. The deed recited that it was made pursuant to a resolution of the board of directors adopted December 31, 1898. The making of the deed was subsequently ratified by two-thirds of the stockholders. The objection made by plaintiff when defendants offered this deed in evidence was sustained, and the deed excluded, upon the ground, as stated by the court, that it did not purport to convey any portion of the mining ground of plaintiff. Admittedly, the description in the deed does include the land of the Tomans adjoining plaintiff's claim, through which the vein in controversy has its dip. Defendants, relying upon the well-recognized

principle that a conveyance of land, in the absence of express reservation, carries not only the surface of the earth, but everything under and over it, including the minerals therein contained, claim that the effect of this deed was to convey to defendants the portion of the vein here in dispute. As the plaintiff was at the date of the deed the owner of such portion of said vein, such must be held to be the effect of the quitclaim deed if the description in the deed includes the same. As has already been seen, the deed purported to convey only such portions of the sections of land as lay east of "that certain patented mining ground known as the Summit Quartz Mine and also east of that certain patented mining ground known as the Amador Consolidated Mine." It is only by construing this language as referring exclusively to the lines of the surface location that defendants' contention that this description included the vein can be upheld. As a matter of fact, the vein under the Toman surface was, so far as it lay between the converging end line planes of plaintiff's claim, as much a part of the Summit Quartz Mine, and of the patented mining ground known as such
213 & 214 mine, as was the land within the surface lines of plaintiff's location. Tyler Min. Co. *v.* Last Chance M. Co., 90 Fed. 15, 21; Empire State, etc., Co. *v.* Bunker Hill, etc., Co. 121 Fed. 973-977; Davis *v.* Shepherd, 31 Colo. 141. It had been by the United States government severed from the Toman land, and granted to plaintiff's predecessor, as an integral part of the Summit Quartz Mine, and the agricultural patents of defendants' predecessors contained a corresponding limitation upon the estate granted to them. Unquestionably it would have been conveyed by any instrument purporting to grant the Summit quartz mining claim or the Summit quartz mining ground, for it was part and parcel thereof. The reasons which would require us to hold that the vein was conveyed by a deed purporting to convey the Summit quartz mining claim or mining ground are equally applicable to a deed purporting to convey only lands lying east of such claim or ground, and forbid the conclusion that it was intended to convey any part of the mining claim or ground itself. A very different case would be presented if we were dealing with a deed which contained a description of a parcel of land simply by metes and bounds, or a deed which purported to convey all lands lying east of a certain defined surface line. We have no such deed here, but one which, in terms, limits its operation to such portions of the designated sections as lie east of the "mining ground" of plaintiff. Taking into consideration simply the character of plaintiff's property, we are of the opinion that the deed did not purport to convey any portion of any vein that had its apex within the surface lines of plaintiff's location, so far as it lay between the converging end lines of plaintiff's claim.

When we examine the deed in the light of the circumstances surrounding its execution, as disclosed by the evidence
215 & 216 introduced by defendants, it is apparent that there was no intention to convey any part of the mining claim.

The resolution of the board of directors of plaintiff authorizing the execution of the deed, which is referred to in the deed, and the instrument of ratification signed by stockholders of plaintiff, show that the object of the quitclaim deed was to free the land and title of the defendants from the effect of a contract made on October 23, 1897, by the Tomans and plaintiff, whereby the Tomans had agreed to sell and convey to plaintiff their lands adjoining plaintiff's claim. It appears from the resolution of the board of directors that the Tomans, owning the agricultural lands lying east of plaintiff's claim, had agreed to sell and convey to plaintiff, the owners of the Summit quartz mine, certain real property, the description being apparently the same as that in the quitclaim deed, and that it had been mutually agreed that the agreement should be canceled—the plaintiff to pay the Tomans $1,000 in consideration of such cancelation—and the president and secretary were authorized to execute on behalf of the corporation "a quitclaim deed of all the right, title and interest of the corporation in and to the real property described in said contract of sale, and particularly described as follows." Then follows the description contained in the deed. The ratification by the stockholders recites the execution to the Tomans of "a quitclaim deed, conveying all their right, title and interest of said corporation in and to the property described in said contract," and ratifies such a deed. It is very clear that it was not the intention of either directors or stockholders to remise or release or quitclaim any interest of plaintiff in or to anything that was not covered by the agreement of sale executed by the Tomans. The manifest object was to place the Tomans, so far as title was concerned, exactly where they were at the date of the execution of the agreement of sale.

217 & 218 Only "the property described in said contract" was to be quitclaimed. The only property described in said contract of sale was property adjoining plaintiff's mining claim. No part of such mining claim was included therein.

We are therefore of the opinion that there was no error in refusing to receive the deed in evidence, for the reason that, quitclaiming only lands lying east of the "mining grounds known as the Summit Quartz Mine," it did not purport on its face to affect any portion of plaintiff's mining claim, and there is nothing in the surrounding circumstances shown by the evidence introduced by defendants, conceding that the language of the deed is such as to justify consideration of those circumstances, that would justify such a construction of the deed as would make it a conveyance of any portion of plaintiff's interest in its mining claim.

The judgment and order are affirmed.

ANGELLOTTI, *J.*

We concur:

SHAW, *J.*

VAN DYKE, *J.*

219 & 220 In the Supreme Court of the State of California. In Bank.

Sac. No. 1095.

CENTR'L EUREKA MG. CO.
v.
E. C. E. MG. CO.

By the COURT:

Rehearing denied, March 2, 1905.
Filed Mar. 2– 1905.
FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

I, Frank C. Jordan, clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of rehearing denied filed March 2nd, 1905, in the above entitled cause, as shown by the records of my office.
Witness my hand and the seal of the court, this 7th day of October, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

221 & 222 *Assignment of Errors.*

In the Supreme Court of the State of California.

No. —.

CENTRAL EUREKA MINING COMPANY (a Corporation), Respondent,
vs.
THE EAST CENTRAL EUREKA MINING COMPANY (a Corporation), James Toman and Eliza A. Toman, Appellants.

The Central Eureka Mining Company, a corporation, James Toman having petitioned the above-named Court for an order permitting them to prosecute a writ of error to the honorable the Supreme Court of the United States from the final judgment made and entered in said cause by the supreme court of the State of California, now make and file with their said petition the following, and specify the same as their assignment of errors herein, upon which they will ask for a reversal of said judgment upon said writ.

223 & 224 I.

At the trial hereof the defendants offered in evidence the deed set forth in the answer herein, to the admission of which the plaintiff

objected. The court sustained the objection and excluded said deed; by which ruling and decision of said court the said trial court erred.

II.

At said trial said defendants specifically objected to the finding that said patent (meaning the patent under which the plaintiff claimed titled to the premises) was issued in pursuance of and in conformity with the Revised Statutes of the United States, Title 32, Chapter 6; and said defendants claimed that said statutes, and especially Section 2320 of the Revised Statutes, did not authorize the issuance of said patent to said Hall McAllister, for that the end lines of the said patent were required thereby to be parallel, whereas they were not parallel. But the court construed Section 2320
225 & 226 of the Revised Statutes (which is a portion of said Chapter 6) so that the said requirement thereof did not apply to this patent, and decided that plaintiff had a right to go outside of the vertical walls of his surface location. And thereby the court deprived said plaintiffs *of* a right, privilege and immunity arising under said Title 32, Chapter 6, and under Section 2320 of the Revised Statutes of the United States, and under the Constitution of the United States, and under the Statutes of the United States relating to agricultural lands and patents therefor. And said courts of the State of California thereby decided that plaintiffs in error had no right or immunity under said statutes relating to agricultural lands and the patents of the United States therefor, nor under said Title 32, Chapter 6, of said statutes, to the possession of the premises; for that said Section 2320 did not apply to said patent, but that the Act of July 26, 1866, entitled, "An Act granting the right-of-way to Ditch and Canal Owners over the public land, and for other purposes," and the act amendatory thereof, approved July
227 & 228 9, 1870, alone applied thereto. That the court erred in so deciding.

III.

That said findings further found and decided that the Patents of the United States, which constitute the origin of title of defendants, were issued, one in December, 1876, and the other in August, 1876, under the laws of the United States providing for the sale and disposition of what is known as agricultural lands * * * but prior to the acquisition of title from the United States by the defendants and their grantors to the land and premises known as the "Toman Ranch," the title to said veins, lodes and ledges * * * extending into and underlying the surface of said premises known as the "Toman Ranch" had been granted and conveyed by the United States, as aforesaid, to grantors of the plaintiff, under and in pursuance of the laws of the United States relating to the sale and disposal of mineral lands; whereas defendants claimed a right and immunity, under and in pursuance of said Statutes providing for the sale and dis-

posal of what is known as agricultural lands of the
229 & 230 United States, to have and enjoy all of the premises in his said Patent described even to the center of the earth. That the Court erred in deciding that the title of the plaintiff by virtue of his said mineral patent was superior to the title of defendants under their said agricultural patents.

IV.

That said findings further decided that the Deed set out in the Answer, delivered by defendants to the plaintiff, did not convey any portion of the said vein or lode in said mineral patent described to the defendants, and did not operate to convey any portion of said vein, lode or ledge. That the Court erred in so deciding.

V.

The Court erred in sustaining the objection made by counsel for plaintiff to the Deed set out in the Answer when offered in evidence by the defendants.

231 & 232 Wherefore, by reason of the foregoing Assignment of Errors and the petition of defendants, the plaintiffs in error herein ask leave to present a writ of error herein to the Supreme Court of the United States, and the plaintiffs in error submit the said Petition and this Assignment of Errors, and pray for an order of this Honorable Court allowing said writ of error.

And said plaintiffs in error further pray that on the hearing of this cause by said Supreme Court of the United States upon such writ of error, all of the judgment rendered herein by the Superior Court of the County of Amador, State of California, and the judgment of the Supreme Court of the State of California affirming the same, may be by said Supreme Court of the United States reversed and set aside.

That on said hearing of such writ of error such other and further order may be made in the premises as may be just.

Dated....., 1905.

CAMPBELL, MELSON & CAMPBELL,
Attorneys for Plaintiffs in Error.

233 & 234 *Petition for Allowance of Writ of Error.*

In the Supreme Court of the State of California.

No. .....

CENTRAL EUREKA MINING COMPANY (a Corporation), Respondent,
vs.
THE EAST CENTRAL EUREKA MINING COMPANY (a Corporation), James Toman and Eliza A. Toman, Appellants.

To the Honorable W. H. Beatty, Chief Justice of the State of California:

Your petitioners respectfully show to this Honorable Court:

That on the eighth day of April, 1901, the plaintiff herein filed its Complaint in the County of Amador, in the State of California, seeking to quiet the title of plaintiff against the defendants. That the Demurrer thereto was filed on the first day of June, 1901. That thereafter, the said Demurrer having been overruled, the
235 & 236 defendants filed their Answer to said Complaint. That at the time of the trial, by leave of Court first had and obtained, defendants filed, October 17, 1901, the Amended Answer of the defendants Toman.

That on the fourteenth day of October, 1901, the cause came on for trial before the Court, sitting without a Jury. Thereupon the Court proceeded to take evidence, oral and documentary; and having duly considered the evidence and the law and the facts, rendered its decision in favor of the plaintiff and against the defendants. Said decision and findings were filed November 6, 1901, and on the same day judgment was entered in favor of the plaintiff and against the defendants. A Bill of Exceptions was duly proposed, amended and settled and allowed and filed on the fifteenth day of June, 1902.

Thereupon, and on or about the fifth day of May, 1902, the Notice of Appeal from said judgment was duly made and filed.
237 & 238 A motion having been made for a new trial, the said motion was denied in open Court June 14, 1904. Another Notice of Appeal from the order denying said new trial was duly served and filed on the 28th day of June, 1904, and an undertaking on each of said appeals, in due form of law, was duly filed in said cause. That said undertaking remains in full force.

That said appeal came on for trial in the Supreme Court of the State of California on the 16th day of November, 1904. And that on the 1st day of February, 1905, said Supreme Court rendered its decision and judgment on said appeal; by the terms of which decision and judgment the judgment of said Superior Court of Amador County was affirmed.

That in said action and proceeding there was involved and drawn in dispute, and decided in said Superior Court, as well as on said

appeal, the right, privilege and immunity claimed by these defendants under the Statutes and Laws of the United States;
239 & 240 that is, under the provisions of Chapter 6 of Title 32 of the Revised Statutes of the United States, and legislation amendatory thereof and subsequent thereto, and under the Act of Congress of July 26, 1866, entitled "An Act granting the right-of-way to Ditch and Canal Owners over the public land, and for other purposes," and also the rights, privileges and immunities claimed by defendants under the Statutes of the United States relating to disposal and sale of the agricultural lands of the United States, and the rights and immunities conferred thereunder upon these defendants by virtue of the agricultural patents to them issued; which said right, title, privileges and immunities so claimed by said defendants under said Acts of Congress relating to said mineral lands, and also to said agricultural lands, were by these defendants at the trial in said Superior Court, and on their appeal before said Supreme Court, especially set up and claimed under the aforesaid Statutes and regulations of the United States, to the effect that these de-
241 & 242 fendants by reason thereof, at all the times mentioned in said Complaint and Answer, had, and now have, the exclusive title and right to the premises described in the Complaint herein, under and by virtue of the provisions of the Constitution of the United States and of said Statutes, and of the patents issued to these defendants in error, one issued December 1, 1876, and the other August 20, 1878, and both made under the Statutes of the United States providing for the sale and disposition of what is known as agricultural lands.

That defendants had good right, title and interest to the premises under and by virtue of said Acts of Congress and of said agricultural patents.

That the defendants set out and claimed at the trial of said cause, and on their appeal against the claim of the plaintiff, that the end lines of said Summit Quartz Mine were not and are not parallel to each other, that said end lines diverged and separated
243 & 244 from each other; that because of the provisions of the Act of Congress approved May 10, 1872, hereinbefore referred to, and Section 2320 of the Revised Statutes of the United States, and because of the Constitution of the United States, the plaintiff is not, and never was, the owner of the premises in the Complaint described by virtue of any patent of the United States to the plaintiff or his assignors issued; that the decision and judgment of the Superior Court of the State of California, as well as the decision of the Supreme Court of said State on said appeal, were each and both decisions against the right, title, privilege and immunity so existing, set up and claimed by the defendants under the Constitution and laws of the United States hereinbefore specified.

The said East Central Eureka Mining Company, a corporation, James Toman and Eliza Toman, being dissatisfied with the judgment made and entered in said action, and with the affirmance of

said judgment by said Honorable Court, and feeling
245 & 246 themselves aggrieved thereby, and by the action of said Court in awarding a judgment in favor of the Central Eureka Mining Company as plaintiff, as aforesaid, and against the defendants herein, the defendants herein claiming under the facts and law that the judgment should have been in favor of the defendants, and that the judgment herein is contrary to the law and the facts, and the judgment should have been that the plaintiff take nothing by its said action, and that the defendants herein should have recovered judgment for their costs herein incurred; for the proof of which statement, and for further particulars as to the questions and matters involved in said cause, reference is hereby made to the record of said cause now on file in the office of the Clerk of the Supreme Court of the State of California, and to said certified copy of said undertaking on appeal; and all of said record, and said copy of said undertaking on appeal, are hereby made a part hereof.

247 & 248 Come now the aforesaid East Central Eureka Mining Company, a corporation, James Toman and Eliza A. Toman, by their attorneys, and petition this Honorable Court to allow said defendants, the plaintiffs in error, to prosecute the writ of error herein to the Honorable the Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the plaintiffs in error herein shall give upon said writ as required by the laws of the United States and by the rules of the Supreme Court of the United States; and that after giving such security all further proceedings in the Superior Court of the County of Amador, in the State of California, and the Supreme Court of the State of California, be suspended and staid until the determination of such cause of said writ of error.

Dated....., 1905.

CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendants and Plaintiffs in Error.

249 & 250 Writ of Error allowed this Third day of October, 1905.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

251 & 252 *Order Allowing Writ of Error and Fixing Amount of Bond.*

In the Supreme Court of the State of California.

CENTRAL EUREKA MINING COMPANY (a Corporation), Respondent,
vs.
THE EAST CENTRAL EUREKA MINING COMPANY (a Corporation), James Toman and Eliza Toman, Appellants.

On the petition of The East Central Eureka Mining Company, James Toman and Eliza A. Toman, praying for a writ of error, and the accompanying assignments of error presented and filed therewith, on this third day of October, 1905, and on motion of counsel for said defendants,

It is ordered that a Writ of Error herein issue, and the same is hereby allowed; and the amount of the bond on said appeal is fixed at the sum of Three Hundred Dollars.

Dated October 3, 1905.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

253 & 254 ***Bond.***

In the Supreme Court of the State of California.

CENTRAL EUREKA MINING COMPANY (a Corporation), Respondent,
vs.
THE EAST CENTRAL EUREKA MINING COMPANY (a Corporation), James Toman, Eliza A. Toman, Appellants.

Know all men by these presents: That James Toman and Eliza A. Toman as principal-, and A. B. Harrison and M. W. Solomon as sureties, are held and firmly bound to the aforesaid respondent, its administrators, executors and assigns, in the sum of three hundred dollars, gold coin, to be paid to the aforesaid respondent, its administrators, executors or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

255 & 256

Dated this third day of October 1905.

Whereas, the above-named plaintiffs in error herein sued out a writ of error to the Supreme Court of the United States to reverse the judgment of the superior court of the County of Amador, in the State of California, and to reverse the findings, judgments and decrees in the above-entitled action;

Now, therefore, the conditions of this obligation are such that if the above-named plaintiffs in error shall prosecute their writ of error to effect and answer all damages and costs if they fail to make the same good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

JAMES TOMAN. [SEAL.]
ELIZA A. TOMAN. [SEAL.]
A. B. HARRISON. [SEAL.]
M. W. SOLOMON. [SEAL.]

Signed, sealed and delivered in the presence of:

____ ____
____ ____

257 & 258 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

A. B. Harrison and M. W. Solomon, the persons named in and who subscribed the foregoing bond as sureties thereto, being severally duly sworn each for himself, says: That he is worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities exclusive of property exempt from execution, and that he is a resident and free-holder within the State of California.

A. B. HARRISON.
M. W. SOLOMON.

Subscribed and sworn to before me, this 3rd day of October, 1905.
EDNA T. KEATING, [SEAL.]
Notary Public in and for the City and County of San Francisco, State of California.

The above bond approved as to form and sufficiency.

____ ____.

259 *Certificate of Clerk.*

I, Frank C. Jordan, clerk of the supreme court of the State of California, hereby certify that the preceding and annexed pages, numbered from one to 259 inclusive, contain and are true and correct copies of the writ of error, citation and bond, transcript on appeal to supreme court of California, judgment of superior court of Amador County, State of California, judgment of the supreme court of the State of California, opinion of the supreme court of the State of California, assignment of errors, petition for writ of error, and order allowing writ of error and fixing amount of bond, as

shown by the records of the supreme court of the State of California now on file in my office.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By G. H. S. DRYDEN,
Deputy Clerk of the Supreme Court.

Endorsed on cover: File No. 19,949. California supreme court. Term No. 447. East Central Eureka Mining Company, James Toman, and Eliza A. Toman, plaintiffs in error, *vs.* Central Eureka Mining Company. Filed October 31st, 1905. File No. 19,949.

No. 141

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1905.

In the Supreme Court U. S.
FILED
MAR 17 1906
JAMES H. McKENNEY, Clerk.

THE LAST CENTRAL EUREKA MINING COMPANY (a corporation), JAMES TOMAN, and ELIZA A. TOMAN,

Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY (a corporation),

Defendant in Error.

141

BRIEF, POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR

ON MOTION TO DISMISS WRIT OF ERROR.

PHILIP G. GALPIN,
CAMPBELL, METSON & CAMPBELL,
Attorneys for Plaintiffs in Error.
PHILIP G. GALPIN,
Of Counsel for Plaintiffs in Error.

Filed this _____ day of March, A. D. 1906.

JAMES H. McKENNEY, Clerk.

By _____ Deputy Clerk.

Pernau Press, S. F.

No. 447

In the Supreme Court
OF THE
United States.

OCTOBER TERM, 1905.

THE EAST CENTRAL EUREKA MINING COMPANY (a corporation), JAMES TOMAN, and ELIZA A. TOMAN,
Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY (a corporation),
Defendant in Error.

BRIEF, POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR

ON MOTION TO DISMISS WRIT OF ERROR.

Defendant in error, in advance of argument on the merits, moves for dismissal of the writ for want of jurisdiction of this court, because no Federal question is presented by the record.

The title to an ore vein of great value is involved, and a similar motion and contention made on the part of defendant in error in the case of the Argonaut Mining Company v. Kennady, also represented by opposing counsel here, was recently decided in this court against his contention. That case is a controlling precedent here.

The point made by opposing counsel is "That " the record no where discloses any claim of right " personal to plaintiff in error asserted by it under " any Federal statute" (See top of page 10 of brief of opposing counsel).

The argument of defendant in error is that its patent is issued under the Act of 1872; that the construction of that statute as made is in favor of its rights; and that while had it lost below and sued out this writ of error, there would have been presented by the record a Federal question, because the decision would have been against the rights claimed by it under the Act of Congress of 1872 (see pages 7 and 8, opposing brief), yet (1) this law does not apply to us and there is for us no Federal question, because we do not claim under the Act of 1872, or, I suppose under any other Federal statutes or (2) if we do the decision on the construction of such statutes is not against our rights.

(2) As to the second objection above noted, obviously the decision is against our rights as is seen by the opinion of the Supreme Court of the

State concerning the Act of 1872, and by our assignments of error (Rec. fols. 221 to 231). As the complaint admitted that the defendant's title to the premises known as the Toman Ranch is derived from the two patents issued by the Government of the United States to the predecessor in interest of defendants (see record fol. 17), we had no occasion to offer those patents and they are in evidence only to the extent of plaintiff's admission in the court below (see fol. 17, record). The decision was against our interest under the statutes relative to disposal of agricultural lands and the patents issued thereunder, which we assert conveyed to us the entire title to the property, notwithstanding the reservations in the patents; and also against our rights under the Act of 1872.

Defendant in error asserts in his brief that the Act of 1872 was construed in his favor. The decision on the rights of respective claimants under these respective statutes of necessity involved a construction of the statutes and present a federal question. Aside from this we now turn to the first objection above noted and in regard to that we assert that we also claim under the limitations contained in the Act of 1872 on the power of the government to issue a valid patent to our opponents.

It remains therefore to examine whether plaintiffs in error legally claim any rights under the Act of 1872. It is quite evident that we do claim such rights and so it appears by the record, and on

this point the construction of the Act of 1872 was also against our rights.

It is obvious that the Act of 1872 contained provisions, some of which were favorable to the defendant in error, some of which were favorable to the plaintiff in error; for instance, the Act conferred power on the Land Office to issue patents for mineral lands. This is favorable to the defendant in error. On the other hand, the same Act and Section contained a provision favorable to plaintiff in error, to wit, the limitation that such patents should not be issued unless the end lines on the survey of the mine making the contest were parallel.

The plaintiffs in error asked that their rights under the Act of 1872 be protected by a construction of that act in regard to the necessity for such parallelism; as to whether the Act meant that the end lines of all surveys must be parallel—or of surveys only located after the Act went into effect.

The court below recognized the right of the plaintiffs in error to a construction of that provision of the Act. This construction we will observe involves a proposition of law and not a proposition of fact as seems to be asserted in the brief for defendant in error; a proposition of law decided against a right personal to plaintiffs in error under the Act of 1872. We properly therefore had our writ of error.

But it is said plaintiffs do not *claim* title under the Act of 1872. They certainly do, and the record

shows it. They claim title not only under agricultural patents but also under the *limitation on the rights of defendants in error* presented in the Act of 1872.

This point is readily seen. The defendant in error was the plaintiff below. On the proofs his case would have been made by the production of his mineral patents alone. He was not required to present or prove or rely on the Act of 1872. The patents alone with possession under them proved his case without more.

But he did *plead the Act of 1872* and it appeared in his complaint that he relied upon it. Defendant below offered his agricultural patents and drew the attention of the court to the limitation on the granting power in the Act of 1872, which forbade the authorities of the Land Office to issue the patent under that Act where end lines were not parallel. This supplemented by proofs that the end lines were not in fact parallel presented to the trial court the necessity of construing the Federal statute as to whether the Act required such parallelism and if such parallelism did not exist, whether the plaintiff had any title to the property. The decision was adverse to the rights claimed by this defendant now plaintiff in error, under the agricultural patents and under the Act of 1872, as is seen by the opinion both in the Court in Amador County and in the Supreme Court.

The opinions below, especially of the Supreme

Court of the state passed emphatically upon the limitation of the Act of 1872 and held that such limitation had no application, although the end lines were not parallel.

If we are correct that we had a right as a matter of defense to introduce and rely on the limitations on the granting power contained in the Act of 1872 in support of our title under the agricultural patents and the Acts of Congress authorizing their issuance, it is clear that we asked the construction by the court of the limitations contained in the Act of 1872 in support of our rights and on that portion of the statute the decision was against the right asserted by us. Here then we have a Federal question presented by us involving the construction of the Act of 1872 and a decision against the right asserted by us under that statute.

The next point made is as to the question whether the claim of right made by us under the Acts of Congress and under the Act of 1872 sufficiently appears from the record. We assume that it is not necessary for us to state in our answer matters already stated in the complaint.

The object of the requirement on the defendant to plead "Some part of the Constitution of the United States or any Act of Congress relied on," is not purely technical nor simply to set a trap for an incautious pleader but to compel him to give notice to the opponent of the Acts on which plaintiff relies and thus prevent surprises on the trial

in the lower courts as is obvious from the opinion cited by counsel on the other side on page 22 of his brief (187 U. S. 155-157). We had to give fair notice of the existence of that on which we intended to rely and should have given it in the court below.

It will be observed in this case that the plaintiff below relies on the Act of 1872 and pleads it, and the answer specially states the *want of parallelism of the end lines,* although it is true the answer does not state "as required by the Act of 1872" but the statement by the plaintiff below in his pleading as to the Act of 1872 made such reference unnecessary; our statement was sufficiently explicit. In speaking of his own patent, the plaintiff below alleges in his complaint (see folio 16), "said patent was issued " in pursuance of and in conformity with the Re- " vised Statutes of the United States, Title 32, " Chap. 6," and then at folio 17, "the defendants " are and for several months last past have been " the owners of the tract of land next adjoining " said Summit Quartz Mine on the east and being " the premises commonly known as the Toman " Ranch. Said defendants title to said premises " known as the Toman Ranch is derived from two " patents issued by the Government to predecessor " in interest of the defendants". The diagram showing the want of parallelism of the end lines is made a part of this complaint. It asserts at folio 20 that "defendants in this action have no " right, title or interest in or claim to any part " or portion of said vein, lode or ledge hereinabove

" described or to any vein, lode or ledge which has " its top or apex within said Summit Quartz Mine " and which in its downward course enters, extends " to, penetrates or underlies the premises known " as the Toman Ranch and belonging to defend- " ants." It asserts in the same folio "that the title " to said veins, lodes and ledges having apices in " said Summit Quartz Mine and extending into and " underlying the surface of said premises known " as the Toman Ranch had been and *was severed* " *from the title to said surface* and had been granted " and conveyed by the United States as aforesaid, " to the grantors of this plaintiff *under and in pur-* " *suance of the laws of the United States regulating* " *the sale and disposal of the mineral lands of the* " *public domain* and generally that the rights of the " defendants were subject to the rights of the " plaintiffs," etc.

The answer denies at folio 33 that the title of the veins, lodes or ledges or any of them, etc., " * * * extending into and underlying the sur- " face of the Toman Ranch had been or was severed " from the title to the surface of said Toman Ranch " and that they had been granted or conveyed by " the United States as in the complaint alleged or " at all to the grantors of the plaintiff under or " in pursuance of the laws of the United States " regulating the sale or disposal of the mineral " lands of the public domain, or in any manner " whatsoever."

The issue presented on the record then, is whether (see folio 16) the plaintiff below held patents issued in conformity with the Revised Statutes of the United States, Title 32, Chap 6. And since the plaintiff had made this allegation and the defendant denied it, what necessity existed for again putting this matter in issue by an affirmative allegation on the part of defendant in error?

Furthermore that this point in issue was thoroughly understood appears from the statement in court of the counsel for the defendant in error (see folio 55), as follows: "When the patent is "introduced in evidence your Honor will see as "you see from the map referring to plaintiff's ex- "hibit No. 3, that the end lines are not parallel and "it is contended by the defendant *that for that* "*reason the plaintiff has no extra lateral right.*" The findings of the court of Amador County at folio 43 of the record say that "said patent was "issued in pursuance of and in conformity with "the Revised Statutes of the United States, Title "32, Chap. 6 * * *. The title of defendants "to the premises known as the Toman Ranch is "derived from two patents issued by the United "States to the predecessor in interest of the de- "fendants"; then follows the reference to the diagram showing the want of parallelism in the end lines.

At folio 47 we have the finding that the defendants in this action "have no right, title or interest

" in or claim to any part or portion of said vein, " lode or ledge hereinbefore described, or to any " vein, lode or ledge which has its apex or apices " within said Summit Quartz Mine, and which in " its downward course enters, extends into or under- " lies the premises known as the Toman Ranch. " Then comes the decision that the title to said " veins had been severed from the title to said " surface and had been granted and conveyed by " the United States, as aforesaid, to the grantors " of plaintiff *under and in pursuance of the laws " of the United States regulating the sale and dis- " posal of mineral lands of the public domain.* The " ownership, possession or right of possession of " defendants and their grantors in and to the " premises known as the Toman Ranch, and to each " and every portion thereof are, and at all times " were subject to the rights and interests of this " plaintiff in and to said veins, etc. * * *." All the ore, mineral deposits, lodes, veins or ledges heretofore or now cut, exposed, open, worked or appropriated by means of said underground works of plaintiff, or by plaintiff in the course of such working and mining underneath the premises described as the "Toman Ranch", are part of such ledge having its top or apex wholly within the boundaries of said Summit Quartz Mine *and within the end lines of said mine projected in their own direction.*

In the judgment at page 52 the court finds that the plaintiff owns the premises described in the complaint "comprising 117,656 linear feet of the

Summit Quartz Mine on which the vein together with all veins, lodes, and ledges having their apex or apices within the extralateral boundaries of said land above described and *within the end lines of said premises* as above described projecting in their own direction through said veins, lodes and ledges, etc. So at folio 53, parties are enjoined from asserting any claim or interest in any vein, etc., in any part of its downward course *within the end lines of said mine,* projecting in their own direction, etc., and the defendant in his bill of exceptions specified the following particulars in which the evidence was insufficient to justify the decision (see folios 168 and 169). The exception is found at the top of page 77. "But limiting the right of possession to "such outside parts of said veins or ledges within "such portions thereof as lie between vertical plains "drawn downward through the end lines of above "described premises continued in their own direc-"tion, in this that the evidence shows that the end "lines of the Summit Quartz Mine as patented by "Hall McAllister *were not parallel,* and the evi-"dence further shows that the patentee under the "patent to the Summit Quartz Mine had no right "to pursue any vein, lode, ledge or deposit beyond "the exterior boundary lines of said Summit Quartz "Mine extended downward, vertically". (See also objection two to the decision taken at the trial, folio 170.) "The evidence shows that the end lines of "said Summit Quartz Mine *were not parallel* and "that said patent was issued under the laws of the

" United States adopted May 10th, 1872, to wit:
" 'An act to promote the development of the mining
" 'resources of the United States,' *which act re-*
" *quired the end lines should be parallel,* etc."

These objections to the decision and findings were taken in the lower court and under the laws of California, were reviewable by the Supreme Court on the appeal. They constitute a part of the record just as did the findings themselves (see Section 657, C. C. P.), and when this question of jurisdiction is determined, the court on the merits will necessarily determine whether or not these objections are well taken. So far as the determination of the rights of plaintiff in error is concerned in the Supreme Court of the state, the opinion of the Supreme Court found at folios 193-4 shows that the Supreme Court passed on this very question of the rights of the plaintiff in error under the Act of 1872, commencing with folios 197-8 to the effect that "the evidence recites that the proceedings were
" had in pursuance of the Act of July 26, 1866, the
" Act amendatory thereof passed July 9th, 1870, and
" the Act of May 10, 1872, and the patent is issued
" inconformity with said Acts, the court says: 'De-
" 'fendants contend, however, that notwithstanding
" 'the attempted conveyance in terms, of the prop-
" 'erty in dispute, the *patent failed to convey* any
" '*extra lateral rights,* by reason of the facts that
" 'the end lines of plaintiff's claim, as located,
" 'surveyed and granted, *were not parallel,* as re-
" 'quired by the Act of May 10th, 1872,' but the

" court decides that this requirement that *end lines* " *should be parallel relates only* to the end lines " of mines which were located after the Act of May " 10th, 1872 went into effect." We find no such provision in the Act. The court then says at folios 201-2, "So far as the particular requirements as " to parallelism of end lines is concerned, it would " appear to be well settled that it has no applica- " tion to locations made prior to the Act of May " 10th, 1872." It would seem to us as if the court had in this opinion construed the Act of 1872 in regard to the necessity for parallelism in end lines of mines located prior to the passage of the Act, and had determined that no such parallelism was necessary to make the patent valid. This determination seems to us to be adverse to the rights claimed by the plaintiff in error under the Act of 1872, and therefore a Federal question is presented.

The above considerations render an examination of the authorities presented unnecessary. They have no application to the case as it stands on this record.

Respectfully submitted,

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No. 141.

In the Supreme Court of the United States

OCTOBER TERM, 1905

EAST CENTRAL EUREKA MINING COMPANY,
JAMES TOMAN and ELIZA A. TOMAN,
Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY,
Defendant in Error.

Brief for Plaintiffs in Error.

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PRESS OF THE JAMES H. BARRY CO.
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In the Supreme Court of the United States

OCTOBER TERM, 1905

EAST CENTRAL EUREKA MINING COMPANY, JAMES TOMAN, AND ELIZA A. TOMAN,
Plaintiffs in Error,
vs.
CENTRAL EUREKA MINING COMPANY,
Defendant in Error.
No. 44.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF FACTS AS TO EXTRA LATERAL RIGHTS.

This writ of error to the Supreme Court of California brings up a record showing the bill filed by defendant in error, holding under a mineral patent, against this plaintiff the holder of an agricultural

patent to quiet title to a mineral ledge underlying the farm of plaintiffs.

This ledge, having its apex in the surface of the land patented to defendant in error, leaves the surface in passing through the side lines of that surface projected vertically downwards, enters the adjoining farm below the surface of the agriculaural patent at the depth of 1094.75 feet, where the shaft crosses the vertical line. (See folio 131 of the record.)

As the holder of the agricultural patent thereby acquired everything from the surface to the center, the defendant in error was bound to prove an extralateral right to the ledge superior to the title held by plaintiff under his patent.

We insist that the case made by this record does not establish an extralateral right in the miner superior to the title made by the agricultural patent, and the judgment below must be reversed and the bill should be dismissed.

The end lines of the mineral patent were not parallel, nor restricted to the dimensions prescribed by the Act of May, 1872, under which the patent issued.

The power of the Land Office is conferred by Acts of Congress and patents in excess of its jurisdiction are void. The record shows that the survey of the mineral patent was not approved until June 4, 1872. (See certificate of J. H. Hardenberg, Surveyor-General, California, page 59 of the record, folio 129,

attached to the diagram opposite page 58). At this date the Surveyor-General had no authority to approve a survey with end lines which were not parallel, or, if he did so, the patent based on such survey carried no extralateral right.

On October 11, 1872, the Register and Receiver gave an opinion that the applicant for the mineral patent should be permitted to enter and pay for said Quartz Gold mining claim. (Folio 126-7-9 of the record.) And at folio 68 is the receipt for the money paid on the purchase, dated October 11, 1872.

We claim this to be the inception of any right of defendant in error. See *Davis* vs. *Wiebold,* 139 U. S., 239, where Judge Field says:

> "According to *Deffenbach* vs. *Hock,* 115 U. S., 392, the patent to a mine relates back to the entry and payment of the price to the Government, and when the patent subsequently issued it took effect at the date of the entry, that being the earliest evidence of any movement for acquisition of any title from the Government."

It is suggested by our opponents, that prior to this time, by virtue of some location by grantors of defendant in error, some rights were confirmed to him by the Act of 1872; that such locations conferred a right not capable of being taken away by the repeal of the Act of 1866, known as Lode and Water Act. Manifestly, the burden is on defendant of proving

up his superior equity which arose from his locations alone.

It is suggested that the patent also recites that it is issued under the Act of 1866, and that Act did not require that end lines should be parallel to give extralateral rights, and that under that Act the patent might have been issued to the Summit Quartz Mine alone. This, however, was not done. The attempt was to grant not only the ledge located on, but also all other ledges which had apexes within the surface boundaries, together with their extralateral rights. (Record, folio 60.)

We suggest that the same rule must obtain in regard to all the extralateral rights of all veins. (See folios 60-61 of the record.)

In *Walroth* vs.*Champion Mining Co.,* 63 Fed., 578, in speaking of this rule, the Court says:

> "This is the rule that applies to all locations made after the Act of 1872, as it ought not to be presumed that Congress by its grant to prior locators intended to give greater rights to them than were given and granted to subsequent locators under the same Act. The *same end lines bound all extralateral rights."* (Page 558).

II.

STATEMENT OF FACTS AS TO DEED.

Prior to October 23, 1897, the Central Eureka Mining Company, defendant in eror, and Tomans,

plaintiffs in error, came to an agreement, in pursuance of which the Central Eureka Mining Company executed and delivered to Tomans a quit-claim deed of the premises in dispute. (Folio 139 of the record.) (Deed at folio 161.) This deed grants to Tomans

> "That portion of Sections Eight (8) and Seventeen (17) Township Six (6) North, Range Eleven (11) East, Mount Diablo Base and Meridian, lying north of the center of that certain wagon road extending between the town of Ione and Volcano and known as the Ione and Volcano wagon road, and lying east of that certain patented mining ground known as the Summit Quartz Mine, and also east of that certain patented mining ground known as the Amador Consolidated Mine."

The map showing the premises covered by the deed is found opposite page 25 of the record, and also appears on page 57.

The Supreme Court of California had before it the identical record now before you, but reached the conclusion that this deed did not cover the premises in controversy and did not "purport to convey any " portion of the mining ground of the plaintiff." The reason given was as follows:

> "Admittedly, the description in the deed DOES INCLUDE THE LAND OF THE TOMANS adjoining plaintiff's claim, through which the vein in controversy has its dip. Defendants' relying upon the well-recognized prin-

ciple that a conveyance of land, in the absence of express reservation, carries not only the surface of the earth, but everything under and over it, including the minerals therein contained, claim that the effect of this deed was to convey to defendants the portion of the vein here in dispute. As the plaintiff was at the date of the deed the owner of such portion of said vein, such must be held to be the effect of the quitclaim deed if the description in the deed includes the same. As has already been seen, the deed purported to convey only such portions of the sections of land as lay east of 'that certain patented mining ground 'known as the Summit Quartz Mine and also 'east of that certain patented mining ground 'known as the Amador Consolidated Mine.' It is only by construing this language as referring exclusively to the *lines of the surface location* that defendants' contention that this description included the vein can be upheld."

(The deed itself is found at folio 161 of the record, and is pleaded in the answer.)

"As a matter of fact, the vein under the Toman surface was, so far as it lay between the converging end line planes of plaintiff's claim, as much a part of the Summit Quartz Mine, and of the patented mining ground known as such mine, as was the land within the surface lines of plaintiff's location. It has been by the United States Government severed from the Toman land, and granted to plaintiff's predecessor, as an integral part of the Summit Quartz Mine, and the agricultural patents of defendants' predecessors contained a coresponding limitation upon the estate granted to them. Unquestionably it would have been conveyed by any instrument purport-

ing to grant the SUMMIT QUARTZ MINING CLAIM or the Summit Quartz mining ground, for it was part and parcel thereof. The reasons which would require us to hold that the vein was conveyed by a deed purporting to convey the Summit Quartz mining claim or mining ground are equally applicable to a deed purporting to convey only lands lying east of such claim or ground, and forbid the conclusion that it was intended to convey any part of the mining claim or ground itself. * * * * * We have no such deed here, but one which, in terms, limits its operation to such portions of the designated sections as lie east of the 'mining ground' of plaintiff. Taking into consideration simply the character of plaintiff's property, we are of the opinion that the deed did not purport to convey any portion of any vein that had its apex within the surface lines of plaintiff's location, so far as it lay between the converging end lines of plaintiff's claim."

Had the case before the Court been one to reform this deed, these reasons, if given for reforming it, might have been pertinent. According to the theory of the Court, the property described in the deed was such portions of Sections 8 and 17 as lay to the east of the surface boundary line between the two patents beyond the end of the ledge to which the miner claimed his extralateral right. Until we reached the end of that ledge we do not reach the end of the mining ground of defendant in error. So that, although the deed gives surface boundaries, those surface boundaries are not to be

regarded but simply, and first, the termination of the ledge. If the ledge went on east across Tomans' ranch and penetrated to sections beyond the surface boundary of that ranch, as accords with their theory the deed could never be located, and the board of directors of the mine were enacting the farce of accepting back from Tomans their notes and presenting them in return with a worthless deed, which could not be located, and to property also to which they had no title.

The proposition stated by the Supreme Court could not arise on this bill, for no issues have been framed to reform the deed. It must be taken as it is and located according to its surface boundaries, and the true rule is the converse to that stated by the Supreme Court of California. The true rule is that everything is granted and passes, unless there are specific reservations. The grant or deed is a quit-claim of land which covered all metals, and has from Blackstone's time until now.

Again:

Whether this deed quit-claims the vein or not, it establishes that the parties agreed upon a line between their respective properties, on the surface and this line on the east was the boundary line on the surface of the Summit Quartz mine, as described on the surface. After the execution of this deed defendant in error is estopped from claiming anything to the east of the surface conveyed.

If we are correct, that, for the want of parallelism of end lines, defendant in error had no extra-lateral right, then he had no mining ground beneath the surface of Tomans' ranch, and necessarily was estopped by its deed from claiming such ledge.

POINT I.

DEFENDANT IN ERROR ACQUIRED NO TITLE UNDER ACT OF MAY, 1872, (Rev. Stat., Sec. 2330) BECAUSE THE END LINES OF PATENT WERE NOT PARALLEL.

Iron Silver M. Co. vs. *Elgin Mining & S. Co.,* 118 U. S., 196;
Del Monte M. & M. Co. vs. *Last Chance M. & M. Co.,* 171 U. S., 66.

In the last case the Court said regarding the subject of end lines:

> "The question in the courts is not, What is equity? but, What saith the statute? Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. (Sec. 2320.) It is not within the province of the Court to ignore such provision, and hold that a locator, failing to comply with its terms has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged."

The contention of the defendants is, as we understand it, that the location of the mine was made prior to 1872 and under the law of 1866; that proceedings were pending in the land office looking to a patent on the 10th day of May, 1872; that whatever rights the locator had acquired at that point of time were reserved to him by the act; and that the patent, although issued under the law of 1872, confirmed the existing rights of the locator under the Act of 1866, and gave to him those rights as well as the rights mentioned in the patent itself; that under the law of 1866 the end lines of claims were not required to be parallel to give extralateral rights. Therefore the present holders, successors in interest to the patentee, have extralateral rights, although end lines of the claim, as patented, are not parallel. To this contention defendants answer.

1ST—THAT BY ACCEPTING A PATENT GRANTING ALL RIGHTS POSSIBLE UNDER THE LAW OF 1872, THE PATENTEE WAIVED AND RENOUNCED ALL THE RIGHTS IN CONFLICT WITH THE PROVISIONS OF THE ACT UNDER WHICH HIS PATENT ISSUED, SO THAT HE RENOUNCED THE RIGHT TO RETAIN CONVERGING END LINES AND OBTAIN A PATENT WHICH SHOULD GIVE EXTRALATERAL RIGHTS ON THE VEIN.

The above proposition was decided in the case of *New Dunderberg M. Co.* vs. *Old,* 79 Fed. Rep., p. , in which it is said—

"The claim of his grantee now is that it can renounce this location and the limitations of the law and the patent upon which it is based and follow the lode, wherever it leads, as the discoverer might have done when he first found it and before he located his first claim to the surface at all. It bases this claim upon the provision of Section 9 of the act of May 10th, 1872 (17 Stat. 91 C. 152), that the repeal of Sections 1, 2, 3, 4 and 6 of the Act of July 26, 1866, page 262, 14 Stat. 461, should not affect existing rights. But it was not the repeal of these Sections of the Act of 1866 that affected the rights of the owner of the Dunderberg lode. That repeal did not deprive him of any right he had to follow his lode into the Frostly claim. It was his location, entry and patent to his claim which did this," etc.

"The act of 1872 required the applicant for a patent to locate his claim on the surface of the ground as a condition precedent to its issue, and it declared what rights he should acquire thereby for the express purpose of defining, fixing and allowing his claims and his rights. Under that act the location of a mining claim on the surface of the ground and its entry for patent is a notice to the Government and the public that the owner claims all the exclusive rights and privileges granted by the act; but it is no less a notice and a legal notice that he renounces and abandons to the Government all other rights and privileges pertaining to his discovery of the lode for which he asks the patent. It would work manifest injustice to permit him who has located and excluded all others from a claim of the full size allowed by the acts of Congress, and from all veins whose apexes lay within its surface, to follow the lode upon the discovery of which that claim was based at right angles to his location and

without its side lines for a distance equal to the length of his claim. In our opinion the acts of 1866 and 1872 conferred no such privilege. A claimant who discovered and located a lode mining claim under the act of 1866 RENOUNCES and ABANDONS ALL RIGHTS and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he LOCATES it upon the surface of the ground, ENTERS it, and ACCEPTS a patent for it under the act of 1872. * * *

"Since the side lines of the Dunderberg claim crossed the course of the strike of the vein, they constitute end lines; and, under the patent to it, the owner of that claim was without right to the possession of that lode outside of those lines after he obtained his patent in 1873. *Mining Co.* vs. *Tarbet,* 98 U. S., 463; *Iron Silver Mining Company* vs. *Elgin M. & S. Co.,* 118 U. S. 196, 207; *King* vs. *Mining Co.,* 152 U. S., 222-228."

The location of the Dunderberg vein was made in 1867 (page 601). The patent was issued September 16, 1873. The Court says:

"Conceding, but not deciding, that the locator of the Dunderberg claim, in 1867, then had the right under the act of 1866, to follow the Dunderberg lode in any direction from his discovery shaft in which it lay, he RENOUNCED that RIGHT when he availed himself of the benefit of the act of 1872, and ACCEPTED HIS PATENT UNDER THAT STATUTE. That act provided that he might claim a patent according to its terms, or that he might retain the rights he acquired under the act of 1866. * * *

"The patentee of the Dunderberg lode located his claim and accepted a patent for it, under the

terms of this act" (viz: the act of 1872). He located it on a tract of land which included his discovery shaft which was 3000 feet long from north to south, 70 feet long from east to west."

It is seen from this case that the acceptance of the benefits of the act of 1872, including all the mineral which lies below the surface mentioned in the patent, including all veins and mineral within the vertical planes of the surface boundaries extended downward, waives the right to follow a lode downwards beyond the vertical lines, because the law under which the patent issues prescribes that the end lines of the claim shall be parallel to give that right. In other words, the patentee cannot have *all the lodes within his surface boundaries which he did not have under the act of 1866, and in addition to that have all the benefit of the act of 1866, which, would permit him to follow the vein downwards, notwithstanding his end lines were not parallel.* He had to elect which rights he would take. He did take those given him by the act of 1872, and by accepting a patent under that act, he thereby renounced all right to any extralateral rights under the act of 1866.

If this were not true, locators of claims prior to the act of 1872 would acquire a right which other locators under the act of 1872 could not claim, and the effect of the statute would be to give to the locators, before the act of 1872 passed, greater rights

than are given to the locators after the act of 1872 was passed. And there would be no reason for conferring greater rights upon the earlier claimants than the latter. Had it been so intended, the act would have so specified. That the rights of a patentee are prescribed and limited by the law under which the patent issues; see

New Dunderberg vs. *Old*, 79 Fed., 698;
Walrath vs. *Champion*, 171 U. S., 170.

In this latter case the Court says:

> "If the same end lines which bound the estralateral rights of the Providence surface survey apply to the Contact vein and to all other veins if any are hereafter found, then no such difficulty can arise. This is the rule that applies to all *locations* made after the Act of 1872, and it ought not to be presumed that Congress by its grant to prior locators intended to give greater rights to them than were given and granted to subsequent locators under the same Act. The same end lines bound all extralateral rights." (Page 558.)

To this point the argument has been that the acceptance of a patent under the act of 1872 is a renunciation of a right to claim privileges conferred by the act of 1866 but denied under the act of 1872, for the act of 1872 denied to any claimant who took a patent under that act the right to follow the vein into adjoining territory if the end lines of the claim were not parallel. To this it might be said that by

the act of 1872 "the existing rights" of locators of mining claims, before the passage of that act, were reserved by the declaration in Section 9, that the repeal by that act of Sections 1, 2, 3, 4 and 6 of the act of 1866 should not affect existing rights, and that applications for mining claims then pending might be prosecuted to a final decision in the General Land Office. But—

POINT II.

AT THE DATE OF THE PASSAGE OF THE ACT OF 1872 THE DEFENDANT HAD ACQUIRED NO EXISTING RIGHT, UNDER THE ACT OF 1866, TO HAVE EXTRA-LATERAL RIGHTS ON A CLAIM WITH CONVERGING END LINES.

His argument assumes that he and the Land Office had taken such action that he had then secured these extralateral rights. The mere fact that he had filed an application with converging end lines would not be sufficient, because on trial in the Land Office it might be determined that he had no right whatever to the location, or that he would be obliged to alter or modify his diagram or survey.

It is necessary to further show that when the act of May 10, 1872, went into effect McAllister's survey had been approved, and his right to converging end lines had thus become an "existing right."

This assumption is wholly untrue.

On January 4th, 1872, W. L. McKim, Deputy Surveyor, surveyed out and ran the end lines of this claim.

After that the survey was "critically examined, necessary corrections and explanations" were made, and it was not until June 4th, 1872, that J. R. Hardenbergh, U. S. Surveyor-General for California, approved these converging end lines (trans., 206-207).

So, that on the 10th of May, 1872, he had no extralateral right under the act of 1866 to any specific tract.

Of course if McAllister had acquired vested rights to an extralateral right on the ledge, Congress could not take it away by repealing the act of 1866 or any part of it.

Thus it has been held that where an applicant for public land had entered his land in the Land Office and paid his money and nothing remained to complete his title but issue of a patent the delay of the Land Office or repeal of the law before patent issued could not deprive him of his "existing right." But, until he had made the payment of money his right did not attach. The settled rule is that until the legal title has passed, or the locator has acquired by payment of money some vested right the public lands are within the jurisdiction of the Land Department and Congress retains control.

See *Diffenbach* vs. *Hoch,* 115 U. S., 592, and *Davis* vs. *Wiebold,* 139 U. S., 239.

Mr. Justice Field said, in the *Yosemite Valley case,* 15 Wal., 87, citing *Frisbie* vs. *Whitney*:

> "And it was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States with a view to pre-emption, do not confer upon the settler any right in the land occupied, as against the United States, etc. * * * The power of regulation and disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, *including the payment of the price of the land,* have been performed by the settler."

The power of the Land Department over public lands of the United States in regard to making and altering surveys is unrestricted. *Michigan Land & Lumber Co.* vs. *Rust,* 168 U. S., 594.

In the late case of *U. S.* vs. *Montana Lumber and Manf. Co.,* 25 Sup. Ct. Reporter, 367—per McKenna, J.—it was held that "the U. S. retained the "right to its timber until the land had been surveyed "and the odd numbered sections ascertained by a "*Government survey;* in other words, that notwith-"standing a Congressional grant of odd numbered "sections, the title remained in the Government un-"til it had exercised its power of survey."

So here no *rights* of locator against the Government accrued to be upheld as a vested right until the Government surveyor had made the survey and the Surveyor-General had approved it. Before that time the power of the Surveyor to make a survey in this manner so as thereby to give extralateral rights had been cut off and he was bound to survey under the act of 1872, and according to its directions: He should have made the end lines parallel. He could only survey as the act of 1872 required. His disobedient act conferred no rights to be upheld after repeal of act of 1866.

> "This jurisdiction (of the Secretary of the Interior) extends to the altering of any surveys whenever in the judgment of the department there has been error or fraud in those already made." *Cragin* vs. *Powell,* 128 U. S., 691.

The same principle applies to mineral lands also. So it was held in *Del Monte M. & M. Co.,* 171 U. S., 70.

> "By Section 2319 quoted, above the mineral deposits, which are declared to be open to exploration and purchase, are those found in lands belonging to the 'United States' etc. And such lands are the only ones open to exploration and purchase. While this is true, it is also true that *until the legal title has passed* the public lands are within the jurisdiction of the land depart-

ment, and, although equitable rights may be established, Congress retains a certain measure of control. The grant is, as is often said, in process of administration. * * * Passing to Sec. 2320, beyond the recognition of the governing force of customs and regulations and a declaration as to the extreme length and width of a mining claim, it is provided that * * * The end lines shall be parallel to each other."

On page 75, *Del Monte M. & M. Co.*

"The locator may antedate the public survey, but whether before or after them, the locator places his location where, in his judgment it will cover an underlying vein, the law requires that the end lines shall be parallel." * * *

The Court then adverts to the natural overlapping of claims and asserts the power of the land office in issuing patents to except from the location overlapping claims.

The above case also determines that in all patents issued under the Act of 1872 the end lines must be parallel.

In *Larkin* vs. *Dolly*, 53 Fed., 337: The patent was issued in 1877 upon a location made under the law of 1866. The diagram having been filed August 13, 1867, and on that day a notice was posted on the claim, that locator intended to apply for a patent. The patent issued under the law of 1872, gave patentee 252 acres of land. Defendant claimed

that patent was restricted by the law of 1872 and was good only for 300 feet on each side of the vein, while plaintiff claimed a right to all the land that the Land Department had power to give under the Act of 1866. That his "existing rights" could not be cut down by Act of 1872. That under Act of 1866 the land office had power to give all the land patented to them. But the Court said "I am of "opinion that the question as to the validity of the " patent depends on the construction to be given to " Sec. 2320 Revised Statute."

The opinion then quotes from this section and adds "after the passage of the act of which this sec- " tion forms a part, it seems very clear to my mind " that the Land Department *had no jurisdiction,* " *power or authority to issue a patent* for a quartz " lode to any surface ground *exceeding 300 feet in* " *width* on each side of the middle of the vein or " lode, and that any patent which is issued for more " than that amount of surface ground is absolutely " null and void as to the excess over 300 feet, and " can be collaterally attacked in a Court of law."

The same section of the Revised Statutes which limited the effect of the patent to a conveyance of 300 feet on each side of the ledge declared that the end lines of the claim should be parallel. The

Courts have decided that unless parallel, the claim carried no extralateral rights.

See also *Larkin* vs. *Roberts,* 54 Fed., 461;

Larkin vs. *Roberts,* 154 U. S., 507.

RESUME.

Our argument is that plaintiff can not recover because

POINT I.

(1.) The plaintiff elected to take its patent under the act of 1872, which gave no extralateral rights except on claims with parallel end-lines and plaintiff thereby abandoned all claim under the act of 1866.

POINT II.

(2.) Defendant in error acquired no "existing" extralateral right under the act of 1866 because:

(a) The survey was not approved under that act prior to May 10th, 1872, and was not final when act of 1872 went into effect;

(b) Plaintiff's grantor neither entered nor paid for the land prior to that date;

(c) The whole matter of the survey was subject to the power of Congress to determine whether

or no the end lines should be parallel in order to give extralateral rights, and Congress determined that they should be parallel before this survey was approved or the land was paid for, consequently before any existing rights had accrued under the Act of 1866.

POINT III.

(a) The deed to the Tomans' must be located by the surface boundaries therein described and not by the unknown extension of a ledge buried 1000 feet below.

(b) The deed proved an agreed surface line boundary, which extended vertically downwards.

(c) Deed an estoppel on this action.

In Oct. 1897, defendant agreed with plaintiffs Tomans to buy, and they agreed to sell some of their land (fols. 140, 141, 142, 144), and papers relating thereto were placed in escrow. There were also other obligations and contracts existing between the plaintiffs and defendants, (fol. 69).

There was also some dispute as to the proper location of Tomans' fence. Subsequently plaintiff and defendants through *their respective attorneys,* negotiated a rescission of the contract of sale, and an extinguishment of all obligations and contracts between them. Defendant agreed to pay Tomans in

settlement the sum of $750 and give to him a quit-claim deed *of the premises.* At this time defendant was insolvent, feared attachments and desired to make full settlement with Tomans and avoid also suit with him. The condition of the settlement was both payment of money and delivery of "a quit-"claim deed of all the right, title and interest of "the corporation (defendant in error) in and to the "*real* property described in said contract of sale "and particularly described as follows: That por-"tion of sections 8 and 17, township 6 north, range "11 east, Mount Diablo base and meridian, lying "north of the center of that certain wagon road ex-"tending between the town of Ione and Volcano, and "known as the Ione and Volcano Wagon Road, and "LYING EAST OF THAT CERTAIN PATENTED MINING "GROUND KNOWN AS THE SUMMIT QUARTZ MINE." (for map see exhibit A, trans., p. 13).

Long after payment of money and delivery of the deed defendant moved plaintiffs' fence easterly to the east line of the patented Summit Quartz Mine as located on the surface of the ground (fol. 160) and then entered plaintiffs' ground east of that line and removed ore underlying the land. Tomans meanwhile had conveyed some of their rights to the "EAST CENTRAL EUREKA MINING COMPANY," and the latter brought suit against defendant corporation to recover for ore taken. This suit was pending when this action was brought.

DEED OF CENTRAL EUREKA MINING COMPANY TO JAMES TOMAN AND ELIZA TOMAN, DATED DECEMBER 31ST, 1898.

We will consider: First, the effect of the words of the deed.

SECOND, the location of the premises therein described.

THIRD, whether plaintiff had any extralateral right by his mining patent.

I.

AS TO THE EFFECT OF THE WORDS OF THE DEED.

The deed reads: "By these presents does quit-"claim and release forever unto the party of the "second part, all those certain pieces of LAND." The land is described in the deed, as we have seen, as that portion of certain sections "lying east of that "certain patented mining ground known as the Sum-"mit Quartz Mine."

> "If a man grant all his land, he grants thereby all the mines of metal or other fossils, his woods, his waters, and his houses, as well as his fields and meadows."
>
> *2 Blackstone Com.*, 19.

The *Civil Code* says (Sec. 659):

"Land is the solid material of the earth whatever may be the ingredients of which it is composed, whether soil, rock or other substance."

"WHERE INDIVIDUALS CONVEY LANDS, THE MINERALS OF GOLD AND SILVER PASS UNLESS EXPRESSLY RESERVED."

Moore vs. *Shaw*, 17 Cal., page 199.

At page 224, the Court said:

"All the interest of the United States, whatever it may have been, in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land; and that term, says Blackstone, 'includes 'not only the surface of the earth, but everything 'under it or over it. And therefore,' he continues, 'if a man grants all his lands, he grants 'thereby all his his mines of metal, and other 'fossils, his woods, his waters, and his houses, as 'well as his fields and meadows.' (*Bl. Com.*, Book II, 19.) From the operation of conveyances of this nature, by individuals, the minerals of gold and silver are not reserved *unless by express terms.* They pass with the transfer of the soil in which they are contained."

A QUITCLAIM DEED IS AS EFFECTUAL TO PASS EVERYTHING BELOW THE SURFACE AND EXTENDING TO THE CENTER OF THE EARTH AS A GRANT, BARGAIN AND SALE DEED.

In *Moelle* vs. *Sherwood*, 148 U. S., 21-29, the Court said:

> "In many parts of the country a quit claim or simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer a complete title as any other form of conveyance. THERE IS IN THIS COUNTRY NO DIFFERENCE IN THEIR EFFICACY AND OPERATIVE FORCE BETWEEN CONVEYANCE IN THE FORM OF A RELEASE AND A QUIT CLAIM AND THOSE IN THE FORM OF GRANT, BARGAIN AND SALE. If the grantor in either case at the time of the execution of this deed possesses *any claim to or interest in* the property it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either."

In *Carpenter* vs. *Williamson*, 25 Cal., 154, it is said that "An ordinary quitclaim deed in this State

"is sufficient to pass any estate of the grantor as at "the time of the execution of the deed."

In *Graft* vs. *Middleton*, 43 Cal., 341, it is said:

> "In this State from the earliest time quitclaim deeds have been in every day use for the purpose of transferring title to lands, and have been considered as effectual for that purpose as deeds of bargain and sale. It is true they transfer only such interest as the seller then has, and don't purport to convey the property in fee simple absolute so as to pass an after acquired title, but to the extent the seller has an interest they divest him of it and vest it in the purchaser."

AS TO THE LOCATION OF THE PREMISES IN THE DEED DESCRIBED.

No proof is required in this case to locate the premises described in the deed on the surface of the earth for the reason that the *complaint* locates them, as the premises *east of and adjoining* the Summit Quartz Mine. (For the map of the Summit Quartz Mine as described in complaint and patent see between pages 12 and 13 and between pages 110 and 111 Trans.)

The complaint states that plaintiff is "the owner "in fee and in the actual, exclusive, notorious and "adverse possession of that certain mine and min-"ing ground commonly known as the Summit

"Quartz Mine situated in Sutter Creek Mining "District," etc. (fol. 6).

The plaintiff then proceeds to delineate the boundaries of the aforesaid Summit Quartz Mine as follows:

"Beginning at a post marked 42 and 48 situate "on the boundary between the Amador Quartz "Mine and the Summit Quartz Mine, then North "79° 35′ East 4 chains 68′ to a post" etc., following the boundaries of the Summit Quartz Mine as located on the diagram annexed to the complaint, and the description ending thus, "CONTAINING 15.50 "ACRES and embracing 1165.56 linear feet of the "Summit Quartz Lode or vein." This is the end of the description of the Summit Quartz Mine," in the complaint. This is as the plaintiff understood it and we understood it when the pleadings were filed. If the exigencies of the trial compelled plaintiff to claim that this description is untrue they should have changed their pleadings to correspond with their facts. But in face of the fact that no evidence was offered changing the location of its mine as portrayed in the diagram attached to the complaint, and no change has been made in the pleadings; and, as in our answer we have joined issue with him according to those allegations, and have admitted that the East line of the mining patent and the West line of the agricultural patent under which defendants hold are the same, it is too late now to

claim that the deed given to the Tomans does not cover the premises lying next adjacent to the East line of the Summit Quartz Mine, and that that line is not in the place and not limited by the boundaries given in the complaint. Not only have the pleadings admitted the boundaries of the Summit Quartz Mine but the complaint further alleges "that within this "said Summit Quartz Mine is a certain vein * * * "carrying gold and other valuable minerals." That this vein "on its downward course, crosses the line IN "THE FOREGOING DESCRIPTION, of the *exterior bound-* "*aries* of the Summit Quartz Mine, and on said "downward course passes outside of a plane drawn "down vertically THROUGH THE EAST SIDE LINE OF "SAID SUMMIT QUARTZ MINE, and enters the LAND "ADJOINING."

Said east line of said Summit Quartz Mine is set forth in the foregoing description of the exterior boundaries of said Summit Quartz Mine, as having a course *South 27 degrees and 15 minutes east and a length of 15.79 chains* (fols. 18-20), which corresponds with the west line of Toman's Ranch.

Furthermore, the findings find "That certain mine "and mining ground commonly known as the Sum- "mit Quartz Mine, situated in Sutter Creek Mining "District, State of California, is "bounded and de- "scribed as follows," and then follows a description of the Summit Quartz Mine in exactly the words of the complaint (see fols. 81 to 84 of the findings).

The findings have established that "the said vein, "lode or ledge in its downward course descends into "the earth at an angle approximately of 65 degrees "eastwardly, and on such downward course passes "outside of a plane drawn down vertically *through "the east side line* of said Summit Quartz Mine, and "enters the *land adjoining* at a depth of 1094 feet "from the collar of the shaft and on said downward "course, and at said depth it reaches, enters, pene-"trates and extends into and underlies the premises "known as the Toman Ranch" (fols. 94-98).

Inasmuch, then, as the words of the deed conveyed all "that part of Section 8 which lies north of the "Ione and Volcano Road and east of and adjoining "the Summit Quartz Mine", it is difficult to comprehend why the deed did not convey to the Tomans the title to the mineral in Section 8, which lay to the east of the east boundary line of the patented Summit Quartz Mine, assuming that prior to date of deed plaintiffs had any rights over the line.

In fact, as the complaint located the land described in the deed verbatim in the answer (fols. 61 to 75), and as no denial of the execution and delivery of the deed was made, under Section 448, *C. C. P.*, we were entitled to judgment upon the record upon the trial. A motion for a non-suit was made (fols. 344 *et seq.*) That motion was denied, to which defendant excepted (fols. 351 to 358).

The trial proceeded, the deed was offered in evidence, but after reading it the Court excluded the deed and decided that plaintiff was entitled to a decree.

And, notwithstanding this deed, the "defendants "were forever forbid, enjoined and debarred from "asserting any claim or interest in any vein, lode or "ledge now being worked by the plaintiff and de-"scribed in the complaint and the decision herein, "in *any part* of its *downward course.*"

That means within the premises deeded to defendants Tomans as described in the Findings. And also "from "interfering with the plaintiff, its servants, "agents and employees in extracting the ore in any "of said veins, lodes or ledges," etc. (see the Findings), and are "enjoined and forbidden to assert any "claim to the ore extracted from any of said veins, "lodes or ledges, or from asserting any claim to the "proceeds taken from any vein, lode or ledge", notwithstanding the complaint shows that the vein entered premises which plaintiff had conveyed to Tomans. Why this deed did not convey to us the mineral is the puzzle referred to this Court.

Counsel below made a learned and elaborate argument to show the nature and extent of their extra-lateral rights in the land they had conveyed to us, but we do not think it important to consider whether the Central Eureka Mining Company derived its interest, if any it had, in the land conveyed to the Tomans,

through various titles, or one, or whether it acquired the land through patents or deeds conveying the premises to it in horizontal layers or vertical slices, whether from a private person or the U. S. Government.

If plaintiffs desired to save out of the deed a horizontal layer of mineral 2000 feet, or any distance below the surface, they should have made that bargain and have inserted that exception in the deed. It is too late to put it in now. They cannot now in this action change the contract nor reform the deed, nor alter nor take from the description of the premises.

The deed shows that they desired as well to release some contracts they had with the grantees; this is no doubt true; but this does not prove that the operation of the deed was to be restricted to such releases and we see no evidence that the deed was to have any restricted effect. On the contrary, it is clear that plaintiffs intended to convey the title to the Tomans and to convey it "clear of all incumbrances", as they mention in their resolution to do so. The extralateral right was either land itself or an incumbrance on the premises described in their deed to Tomans, and this extralateral right passed to the Tomans not only by the deed but in accordance with the agreement of the parties.

The Court says (fol. 445): "Now this deed does "not upon its face purport to convey any portion of "the mining ground of the Central Eureka Mining

"Company. It purpots to convey by quitclaim deed "the lands described on the face of the deed which "lie East of the Central Eureka Mine or the Summit "Quartz Mine as patented. * * * There is noth- "ing in the deed that is not plain and clear. There "is nothing in the language of it that I can find that "is at all ambiguous which would entitle the Court "to admit outside evidence to explain its terms. Of "course that being so they could not be varied by "such evidence, and that being the case it seems to "me that the Court has no right to introduce in evi- "dence a paper, or permit it to be introduced into "evidence, that upon its face bears no relation to the "case at all—*to the property in controversy in this "case*" (fols. 446-447). Evidently the Court was looking for a conveyance of mineral in the deed and overlooked the fact that when plaintiff conveyed LAND he necessarily conveyed all the mineral in it and all his right, not only to the surface, but to everything lying East of the vertical plane which is the boundary of the piece granted on the West. If plaintiff had only an extralateral right to operate within that territory it necessarily passed by the deed whether you call plaintiff's right, "land" or "an easement," or "incumbrance" upon Toman's title.

JUDGMENT SHOULD BE ORDERED FOR DEFENDANTS.

DEED.

This case is on review before this Court on an appeal from the judgment.

The deed from the Central Eureka Mining Company to the Tomans, under which defendant's claim is set out in full in the answer (fols. 63 to 76).

Its execution was never denied by plaintiff, as required by Sec. 488 of the *Code of Civil Procedure*, and is, therefore, admitted by the pleadings.

That the execution and delivery were admitted on the trial is evident for the Court finds "The deed "dated December 31st, 1898, and set out in *haec "verba* in the respective answers of the defendants "herein, does not include any portion of said mine, "etc." This finding conclusively assumes that the deed was made and delivered.

The objection to it was substantially that the premises described in it do not convey the mineral below and to the east of the east line of the Summit Quartz Mine.

If this Court concludes that this deed conveyed to the Tomans the portion of the vein underlying the land described in this deed, it would be conclusive of any controversy that could arise hereafter, and upon the findings we are entitled to have this Court order

that the judgment be reversed and judgment final be entered for defendants, quieting title of plaintiffs to the premises.

EXTRALATERAL RIGHTS.

If the Court should reach the conclusion that plaintiffs have no extralateral rights, that is the end of this controversy and the same result would follow.

All which is respectfully submitted,

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PHILIP G. GALPIN and
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October 1, 1906.

FILE COPY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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No. 141.

EAST CENTRAL EUREKA MINING COMPANY ET AL.

vs.

CENTRAL EUREKA MINING COMPANY.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

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SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

In addition to the extended and able brief already submitted on behalf of the plaintiffs in error, we desire respectfully to submit the following suggestions:

The defendant in error claims extralateral rights in plaintiff in error's land by virtue of defendant in error's mining patent and the laws upon which it is based. The patent in question cites the various antecedent steps as having been taken in pursuance of the act of Congress of July 26, 1866; of the act of July 9, 1870, (which does not relate to the subject-matter in controversy), and of May 10, 1872, and in consideration of the premises grants to Hall McAllister, predecessor in title to the defendant in error, the land claimed by him, following the language of section 3 of the

act of 1872 as to extralateral rights and giving the grantee the right to follow all veins other than the principal one—

> "as against all persons claiming under locations made upon such other veins, lodes, ledges or deposits subsequent to May 10, 1872."

If this deed could legally convey to Hall McAllister all the property it purported to convey, then, subject only to the effect of the subsequent deed from Hall McAllister's grantees to the plaintiffs in error, the defendants would be entitled to the mining vein claimed by them, and to the right to pursue it under plaintiff in error's land, but if, on the other hand, the patent did not or could not convey to Hall McAllister any right whatever to pursue the vein under the adjoining land, then plaintiffs in error must prevail.

A preliminary question to which we may address ourselves is,

May a Patent Convey Greater Rights Than Are Authorized by Statute?

To put this question is to answer it, and we only advert to it because the defendants in error appear to insist upon their rights under the patent as if the verbiage of the patent gave them something independent of and apart from the bald language of the statute. Our belief is that a patent cannot initiate any rights over and beyond those conferred by statute upon an entryman by his entry. A patent is merely a convenient evidence of the perfection of the rights secured by the entry, and it alike with the entry must be limited in its extent by the acts authorizing it. This is merely another way of saying that the executive officer must act within the limitations of the authority given him, and that an act going beyond such limitations is void and is subject to attack in any collateral proceeding.

Doolan *vs.* Carr, 125 U. S., 618.

Let us proceed, then, to the next question which is one of real importance, and is,

Under What Act Could a Patent be Issued on October 11, 1872 (the Date of the Patent)?

The act of 1866, in section 3, authorized the issuance of a patent, certain preliminaries being complied with. Section 3, however, was repealed by section 9 of the act of 1872. It is suggested that because section 9 contained a proviso that "such repeal shall not affect existing rights," therefore the right to a patent, certain preliminaries being met, granted by section 3 of the act of 1866 remained intact. This is, we think, a palpable error. Section 3 of the act of 1866 being repealed, Hall McAllister had no right which could be enforced against the United States whatever might be his situation with respect to right of possession as to third parties. The privilege or license, as it may be termed, to obtain a patent was not a right. This is well pointed out in the Yosemite Valley case (Hutchings *vs.* Low, 15 Wall., 67), holding that the Government might dispose of lands at any time, even though steps had been taken to pre-empt them, so long as final entry had not been made. For rights are in a degree relative. The Government could not enforce a pre-emption, and a pre-emptor might at any moment conclude that he would abandon the land in question.

In the examination of the proposition now under discussion and as sustaining our propositions, we refer also to Frisbie *vs.* Whitney, 19 Wallace, 187, and a very full discussion in Allen *vs.* Forrest, 24 L. R. A., 606.

Furthermore, section 9 of the act of 1872, in the very next sentence, shows exactly the right which was preserved, stating, as it does, that—

> "Applications for patents for mining claims now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act."

We submit, therefore, that, however valuable the recitals contained in the patent may be as referring to the statute under which antecedent steps have been taken, they are not to be construed as amounting to the granting of a patent under a repealed act, the more so that the only patent allowed to be issued after May 10, 1872, was a patent which should be strictly "in pursuance of the provisions of" the act of that date.

It is interesting to note that the Supreme Court of California recognizes in this case that at the time of the passage of the act of 1872 the locator possessed no right which might not be disposed of by act of Congress, for it says (Record, p. 89, fols. 205, 206) that—

> "The rights sought by the act to be preserved were such as had been acquired under the prior acts, by the making of a valid location, *even though those rights were not of such a nature that the government might not, if it had seen fit so to do,* deprive the locator thereof."

To say that the Government may without restraint deprive you of a right is equivalent to saying that, as against the Government, you have no right; for if there be a property right you may not lose it to the Government save upon the payment of adequate compensation; and thus the California Supreme Court sustains the argument we are now making.

We are brought next to consider exactly

The Sort of Patent, as to the Boundaries, Which Could be Issued under the Act of 1872,

and we find, as we shall hereafter attempt to demonstrate, that any patent so issued was of necessity to be controlled by section 2 of the act in question, reading as follows:

> "That mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar,

lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end lines of each claim shall be parallel to each other."

This section of four sentences may be analyzed as follows: The first sentence relates to mining claims theretofore located, which as to their length are to be governed by the customs, &c., in force at the date of their location. The second sentence relates to the length of mining claims located after the passage of the act. The third sentence establishes the width of all claims, as we shall contend, whether located before or after the passage of the act, as is evident from the exception the sentence contains, "where adverse rights *existing at the passage of this act* shall render such limitation necessary." The wording of this exception conclusively shows that the sentence refers to both classes of locations. The final sentence of the section, in view of the foregoing explanation, of necessity refers to the end lines of claims, whether antecedent or subsequent to the passage of the act.

If our argument be sound, as we believe it, we must conclude, first, that no patent could issue after May 10, 1872, except under the provisions of this act; and, second, that under the provisions of the act no patent could issue save for a claim where the end lines were parallel to each other.

That the construction which we now put upon this section is correct is apparent by reference to the case of Lakin *vs.* Roberts, 54 Fed., 461, in which Mr. Justice McKenna delivered the opinion. In that case the contest related to the width of locations; and, referring to section 9 of the act of 1872, incorporated as section 2328 in the Revised Statutes, the court said:

> "It is not contended that plaintiff's interests were so far vested that by that act Congress had no power to limit or vary them. We shall assume, therefore, that Congress had this power, and having it, we think it exercised it in the provisions we have quoted."

Further discussing the case, the court said that—

> "The Land Department, therefore, had no power to issue a patent for a greater width of land than three hundred feet, and the patent in this case, in excess of three hundred feet is void. Doolan *v.* Carr, 125 U. S. 624, and the other decisions cited in the opinion of the learned judge who tried the case in the circuit court."

In the case we are now discussing, as appears from Lakin *vs.* Roberts, 53 Fed. Rep., 333, the patent was based upon an entry applied for on August 30, 1867, the patent finally issuing as in the case at bar, after the act of 1872, on March 17, 1877.

We apply the reasoning in Lakin *vs.* Roberts, and insist that, as in the case referred to, an entry wider than the act of 1872 permitted was void as to excess, so now an entry the end lines of which are not parallel must be absolutely void; for, although in the Lakin case the void portion could be separated from the part that was valid, and the patent sustained in so far as it was valid, in the present case, the end lines not being parallel, it is impossible to say to what extent the patent is valid and to what extent it is void; and,

the elements being so intermingled as to be incapable of distinction, the entire patent must fail. Stating the case in another way, end lines not in uniformity with the statute are no end lines, and the patent fails for want of an adequate description, at least so far as extralateral rights are concerned.

We are not overlooking the case of Carson City Gold and Silver Mining Company *vs.* North Star Company, 83 Fed., 658, which it must be confessed is in principle upon the point now in controversy apparently on all fours with the case at bar and which sustains the contentions of the defendant in error. In the Carson City case the court held that the application, which was made after the act of 1866 not requiring parallelism of end lines, the entry being after May 10, 1872, was valid, and the Court says:

> "The act of 1866, under the provisions of which the patent in this case was applied for and under which the rights of defendant in error accrued, did not require parallelism of end lines. * * *
>
> "Moreover, the end lines as marked on the diagram converge in the direction of the dip, giving the patentees less of the vein or lode in depth than they had at the surface. The object of the act of 1872 in requiring parallelism of end lines was intended to give to the claimant of the lode as much of the lode or vein in its downward course as he has at its surface, but no more. It appears from the findings that the defendant in error was only allowed 2,200 feet of the apex of the lode because it was cut on the west by a 'crossing' as shown on the diagram. The restriction of its rights in these particulars cannot be complained of by the plaintiff in error."

We shall suggest that the first point has been already covered by our analysis of sections 2 and 9 of the act of 1872, showing that no right existed after May 10, 1872, to issue any patent where the end lines were not parallel. Further answering the suggestions of the court, we do not think that we can search for an object in the act of 1872

which will destroy its plain language, and upon this point cite the language of the court in Del Monte M. & M. Co. *vs.* Last Chance M. & M. Company 171 U. S., page 67, where it is said:

> "There is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed (sec. 2320). It is not within the province of the court to ignore such provision, and hold that a locator, failing to comply with its requirements, has all its rights extralaterally and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged (Iron Silver Mining Co. *vs.* Elgin M. & S. Company, 118 U. S., 196)."

As to the further suggestion of the court, as applied to this case, that the plaintiffs in error could not complain of the restriction of their rights, the patent giving less to the defendant in error than would have been allowed it had the act of 1872 been followed, we have to say that the suggestion ignores the void character of the patent. The question as to whether their rights are affected favorably or unfavorably because of a greater or less amount of the vein being taken becomes unimportant. The rights of the plaintiff in error have been affected because the court below has given efficacy to a patent void because of non-compliance with the law. Whether the plaintiffs in error would have been affected favorably or unfavorably by a valid compliance with the law is entirely an immaterial proposition.

Discussing this matter further, let us imagine a case where the vein, instead of departing from the defendant in error's side lines on the converging side, has passed through the diverging side into the land of our adjoining holder. What then would be said of the effect of the patent upon the landowners upon such opposite side? Would the patent owners, despite the divergence of the end lines, have had the right to follow the vein in all its divergence under the land of the adjoining owners? Is the validity and effect of the patent

to be determined by the departure of the vein from between converging or diverging end lines? Is the patent, in other words, to be valid where its end lines converge, and invalid where its end lines diverge? And can the question before us be answered save by a strict adherence to the language of the act of 1872?

But it may be responded that the defendants in error have a right to rely upon section 3 of the act of May 10, 1872 (Rev. Stat., sec. 2322), the verbiage of which is incorporated into their patent, and we are brought to the question,

Does Section 3 of the Act of 1872 Dispense with Section 2 Requiring Parallelism of End Lines?

For convenience we quote all of Section 3, as follows:

> "That the locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States, and with the State, territorial, and local regulations not in conflict with said laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations: *Provided,* That their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges: *And provided, further,* That nothing in this section shall authorize the loca-

> tor or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Study of this section shows that it has not the slightest reference to any question other than that of the possession and enjoyment of mining locations. It does not relate in any degree to their length or breadth or parallelism of the end lines, or to end lines at all, except so far as it recognizes them as bounds. It is not a change of section 2, but is to be construed as to the end lines in connection therewith. The right of locators when they apply for a patent is to be construed by reference to the other provisions of the act of May 10, 1872, governing the issuance of patents and the boundaries to be observed when patents are issued. Construing the case of Lakin *vs.* Roberts with reference to this section, we may conceive the interpretation of the court to have been that the original locators could have remained indefinitely in possession of the ground they had taken up, but that when they applied for a patent they were bound by the provisions of the statute. Applying this interpretation to the case at bar, we may say that had the defendants in error never sought a patent, but continued in possession of their claim as originally located, they might have preserved such possession indefinitely, complying with the rules as to assessment work, only paralleling their end lines and circumscribing, if necessary, their claim in its width and length when a patent should be considered desirable.

This interpretation, we submit, gives full meaning to all sections of the statute, allowing the defendant in error its full possessory rights so long as it might choose to rest upon them, and allowing it the new and additional rights which it might obtain by a patent, subject to disabilities as to the boundaries fixed by section 2 of the act.

The interpretation we are giving to the act accords with the language of the court in the case of New Dunderberg

Mining Company *vs.* Old, 79 Fed. Rep., 601, wherein the court said:

> "Conceding but not deciding that the locator of the Dunderberg claim in 1867 then had the right after the act of 1866 to follow the Dunderberg lode in any direction from his discovery shaft in which it laid, he renounced that right when he availed himself of the benefit of the act of 1872, and accepted his patent under that statute. That act provided that he might claim a patent according to its terms or that he might retain the rights he acquired under the act of 1866."

Construction of the Deed from the Defendant in Error to Toman.

This question is very fully discussed in the brief already filed and as it is, subject only to slight differences, the same question recently argued in the case of Montana Mining Co. *vs.* St. Louis Mining Co., we forbear from entering into the discussion.

As to the Existence of a Federal Question.

The facts upon which a Federal question arises are as follows:

Plaintiff and defendant in the original complaint, in the superior court of Amador county, California, were owners of adjoining tracts of land, plaintiff holding under a mineral patent and defendant under (1) agricultural patents from the U. S. and (2) a quitclaim deed from the plaintiff.

The complaint alleges the mineral patent to the plaintiff's predecessor in title; the right to follow beyond the side lines designated in the patent veins having apex within the surface boundaries; that a certain vein having such an apex passes through the side lines adjoining defendant's property; that—

> "defendant's title * * * is derived from two patents issued by the Government of the U. S. to the

predecessor in interest of the defendant. One patent was issued December 1, 1876, and the other August 20, 1878, and both were made under the laws of the U. S. providing for the sale of what is known as agricultural land?"

That by reason of their ownership of this adjoining land the defendant claims to be the owner of the vein above referred to after it passes through the vertical plane extended downward from the dividing line between the two properties; that they deny the right of the plaintiff below to such ores and have brought an action of trespass to recover $165,000 for ores extracted from said vein by the plaintiff and threaten other suits. The prayer is to quiet title and enjoin actions by defendants below (Rec., pp. 6 to 9).

By their answer the defendants below deny that the mineral patent set forth in the complaint conveyed to the patentee any extralateral rights to veins extending beyond the vertical side lines, and allege that they are owners of all veins lying beneath the surface of their land described in the complaint. They deny that their ownership or possession to said land is subject to the rights of the plaintiff to veins, lodes, &c., as claimed in the complaint.

As a further and separate defense, the defendants set forth the conveyance by the defendants, by quitclaim deed, to the defendants of—

> "All those certain lots, pieces or parcels of land, situate, lying, and being in the said county of Amador, State of California, and bounded and particularly described as follows, to wit:—
>
> "First: That portion of section eight (8) * * * lying east of that certain patented mining ground known as the Summit quartz mine."
>
> Record, pages 12 to 16. See estate granted, page 16.

The decisions below relate principally to the question of the right to the vein of ore under construction of the Federal

statutes, regardless of the effect of the deed; so that the latter can be eliminated from further consideration on the present issue, whether a Federal question is presented.

The defendants below raised the question here presented as Federal questions in trial court (Record, pp. 76, 77, and 78). They claimed, and now assert, that the plaintiffs below had no extralateral right to the vein of ore after it passes beneath the surface of their property, for the reason that under the statutory authority of the Secretary of the Interior, who issued the mineral patent, the requirement that the end lines of the claim be parallel, disregarded in this case, defeats the grant as to such extralateral rights.

That this is a question involving the construction of a federal statute; that the provision of the statute was asserted by the plaintiff in error with sufficient particularity (see California Nat'l Bank *vs.* Kennedy, 167 U. S., 362), and that the right, title, and ownership of the plaintiff in error was dependent upon the construction of that statute and is wholly defeated by an adverse decision is manifest. It is certainly within the spirit of section 709, Revised Statutes, and we think it is clearly within the letter of that statute.

Either upon a construction of the term "immunity" in that section or a liberal interpretation of the whole section, this court has frequently taken jurisdiction when the Federal question is not a right, title, privilege, or immunity granted as such in the express language of the section, but where a defense asserted is based upon a limitation in some statute relied upon by the plaintiff—an immunity from suit by reason of the existence of some provision defeating the plaintiff's right.

In the case of California Nat'l Bank *vs.* Kennedy, cited *supra,* the bank defended the action on the ground that the contract it had made with the plaintiff, then sued on, was *ultra vires* under the national banking law—that it had no power to subscribe to stock in another corporation. It was held that this defense presented a Federal question under Revised Statutes, section 709. Other cases in which the

Federal question presented arose under circumstances similar to the case at bar are:

Scoope *v.* Leffingwell, 105 U. S., 3.
McCormick *v.* Market National Bank, 165 U. S., 538.

As important in determining whether the mining law was the basis of an affirmative claim of right by the plaintiff in error, attention is called to the fact that the complaint in the present case sought to restrain the prosecution by the plaintiff in error of a trespass suit for compensation for ore, stated at one hundred and sixty-five thousand (165,000) dollars, taken by the defendant in error from the part of the vein in dispute. This suit is restrained by the action of the court now appealed from. In the trespass suit the defense made in the present suit, as shown by the complaint in this suit, is the right to the part of the vein in dispute based upon the non-existence of extralateral rights in the defendant in error under the construction of the act of 1872. The defendants "invoke" the statute for the protection of their rights.

The defendants in error state in their brief in support of motion to dismiss (page 17) that the plaintiffs in error claim the ore bodies in dispute by virtue of their ownership of the overlying surface of the adjacent land. This is not a correct statement of the facts as disclosed by the record. Their patents were subject to the rights of mineral claimants to follow veins, and to determine the extent of their grant it must be first determined what valid rights exist to follow veins under the surface of their lands. Therefore the extent of their right in respect to the veins of mineral such as that involved here depends wholly upon the construction of the mineral laws.

The reference in the agricultural patent to extralateral rights of mine owners is in effect a direct reference to the mineral laws.

Respectfully submitted,

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Plaintiffs in Error.

No. 141

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1905.

Supreme Court U.S.
FILED
FEB 23 1906
JAMES H. McKENNEY, Clerk

THE EAST CENTRAL EUREKA MINING COMPANY (A CORPORATION), JAMES TOMAN, AND ELIZA A. TOMAN,

Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION),

Defendant in Error.

141

Motion to Dismiss Writ of Error

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Attorneys for Defendant in Error.

Filed _____ 1906.

JAMES H. McKENNEY, Clerk.

By _____ Deputy Clerk.

THE MURDOCK PRESS, 332 Clay Street, S. F.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1905.

No. 447.

THE EAST CENTRAL EUREKA MINING COMPANY (A CORPORATION), JAMES TOMAN, AND ELIZA A. TOMAN,
Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION),
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

Comes the defendant in error herein, by its counsel appearing in that behalf, and moves this Honorable Court to dismiss the writ of error in the above entitled cause on the ground that this Court has no jurisdiction.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Counsel for Defendant in Error.

To Mr. P. G. Galpin, attorney of record for plaintiffs in error in the above-entitled cause:—

You are hereby notified that the defendant in error in the above-named cause will, on the 19th day of March, A. D. 1906, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion, and the brief thereon hereto attached.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Counsel for Defendant in Error.

Copy of the foregoing motion, notice, and printed argument in support of said motion, and receipt of printed copies of the same is acknowledged this 12th day of February, 1906.

PHILIP G. GALPIN,
Atty. for Plffs. in Error.

STATEMENT OF THE CASE.

This is an action brought by defendant in error to quiet title to the Summit Quartz Mine and Mining Claim and to a gold-bearing vein which has its apex within the surface boundaries of said mine and mining claim and which said vein on its downward course enters the adjoining land claimed by plaintiff in error and called the Toman Ranch.

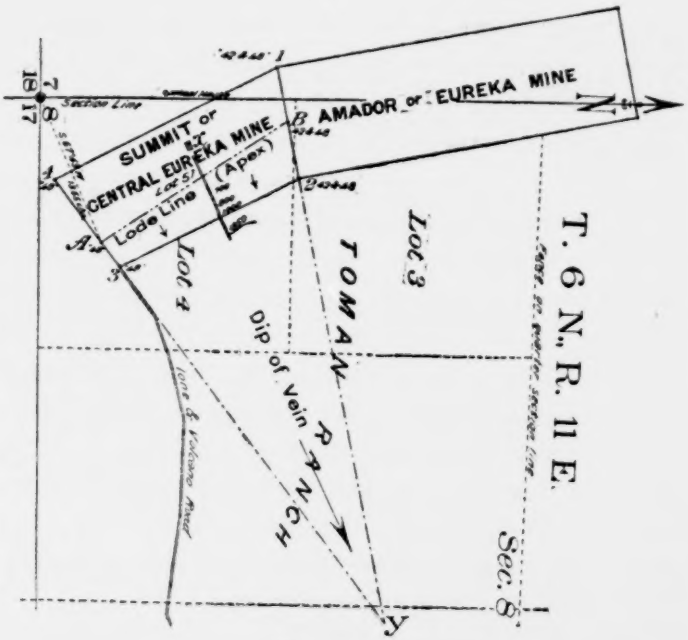


Figure 1.

The claim of defendant in error to the bodies in dispute rests upon a United States Patent to the Summit Mine, issued to Hall McAllister November 25, 1873, upon locations made in 1863 and 1865, and an application for patent filed in 1871. The instrument purports to grant the mining premises described with the exclusive right of possession and enjoyment of 1165 and 56-100 feet of the vein throughout its entire depth even though it might enter adjoining land; and recites that the proceedings were carried on in pursuance of the Act of 1866, the Act of 1870, and the Act of May 10, 1872, and that the patent was issued "in conformity with said acts."

Plaintiffs in error own the Toman Ranch, their title resting upon agricultural patents issued in 1876 and 1878, each containing reservation clauses as to veins or lodes apexing outside the surface boundaries granted.

Defendant in error, in its complaint, alleges ownership in fee of the Summit Quartz Mine; issuance of patent therefor; acquisition of patent rights by defendant in error through mesne conveyances, and the existence of the vein, its course and dip, as shown upon Figure 1.

Plaintiffs in error in their answer admit that patent issued to Hall McAllister for the Summit Quartz Mine, and that defendant in error has acquired all rights conferred thereby, but deny that said patent conveys any extralateral right. Deny that the Summit application was made February 7, 1871, or prior to October, 1872; deny that said application was based upon locations made in 1863 and 1865; deny that McAllister ever had any right to follow the Summit vein beyond the surface boundaries; deny that defendant in error ever acquired any right so to follow said vein; allege that plaintiffs in error own all veins beneath the Toman Ranch.

The decision of the trial court was in favor of defendant in error, plaintiff below.

Plaintiffs in error, defendants below, objected to the finding that the patent granted 1165 and 56-100 feet of the vein with the right to follow the same outside the surface boundaries, on the ground that the evidence was insufficient to sustain said finding, in that it showed that the end lines were not parallel and that the holder was limited to vertical planes drawn through the surface boundaries.

They objected to the finding that said patent issued in conformity with the Revised Statutes, Title 32, Chapter 6, in that the evidence showed that the same issued in pursuance of the Act of May 10, 1872.

The same objection of insufficiency of the evidence to support said findings was interposed to all other findings made.

The sole error of law assigned to the rulings of the trial court was to the action of that court in excluding a quitclaim deed from defendant in error to plaintiffs in error covering a part of the Toman Ranch adjoining the Summit Mine on the east.

The State Supreme Court affirmed the judgment and held:—

1. That the patent was issued on locations made prior to May 10, 1872, and on an application pending at that date, hence that the requirement as to the parallelism of end lines did not apply. That said patent issued pursuant to the act of 1872 because that Act was the only statute in force providing for the issuance of patent; but that it was governed by the provisions of the Act of 1866 as to surface boundaries and underground rights because the Act of 1872 in repealing the prior acts preserved all the rights which locators by virtue of their locations had initiated at the time of such repeal.

2. That the patentee by accepting patent under the Act of 1872, being the only act under which patent could issue, and receiving the additional rights given thereunder, did not renounce the right to follow the vein on its dip within converging end lines.

3. That the quitclaim deed offered by plaintiffs in error purported to convey no portion of the Summit Quartz Mine, hence was properly excluded by the trial court.

POINTS AND AUTHORITIES.

Section 709 of the Revised Statutes enumerates the three classes of cases in which the Supreme Court of the United States can issue writ of error to review the decision of a State court, as follows:—

1. "Where is drawn in question the validity of a treaty "or statute of, or authority exercised under, the United "States, and the decision is against the validity;" or

2. "Where is drawn in question the validity of a statute "of, or an authority exercised under any State, on the "ground of their being repugnant to the Constitution, "treaties or laws of the United States, and the decision is "in favor of their validity;" or

3. "Where any title, right, privilege or immunity is "claimed under the Constitution, or any treaty or statute, "or commission held or authority exercised under the "United States, and the decision is against the title, right, "privilege or immunity specially set up or claimed by "either party under such constitution, treaty, statute, com- "mission or authority."

It is apparent that neither party questioned the validity of any statute, treaty or authority, and that neither State court passed upon any such question. It follows, therefore, that the writ must be maintained, if it can be maintained, because of the denial by the State court of some right, title,

privilege or immunity of the class enumerated in division three, specially set up and claimed in that court by plaintiffs in error.

I.

THE RECORD SHOWS THAT PLAINTIFFS IN ERROR RAISED NO QUESTION OF THE CLASS SET FORTH IN DIVISION THREE OF SECTION 709.

There was involved a question which, had it been decided otherwise, would have made a review of the decision possible. Plaintiff below, defendant in error here, claimed a right and a title under the acts of Congress pursuant to which its patent to the Summit Quartz Mine was issued. It claimed a right under the Act of 1872 because at the time its patent was issued that was the sole act in existence under which patent could issue, and because that act in repealing the "Lode and Water Law" expressly preserved to prior locators all rights existing at the time of such repeal, and accorded such locators the right to complete to patent all proceedings pending before the land office at that time. It claimed rights under the Act of 1866 for the reason that the Summit locations were made and application for patent was presented to the Land Department under that Act. A denial of the right to follow the vein on its dip within the converging end lines would have rendered the decision reviewable at the instance of defendant in error.

It does not follow, however, that when the State court has confirmed the right claimed by defendant in error,

plaintiffs in error can, on the basis of that federal question, take the case up on writ of error. A decision favorable to defendant in error upon the right claimed by it must in the nature of things, be adverse to the claim of plaintiff in error to the property involved in suit. But it is only a decision against the right claimed under the Federal Statute that may be reviewed on writ of error and not a decision in favor of the right but against the contention of the opposing party. To bring himself within the provisions of the third decision of Section 709 the plaintiff in error must assert under a federal statute a right, title, privilege or immunity, personal to himself. Mere denial of such a right claimed below by defendant in error and decided below in favor of defendant in error, will not satisfy the statute.

In *Strader* v. *Baldwin*, 9 Howard, 261, the court said:—

"The plaintiffs in this case have set up no act of Con-
"gress in their pleadings, under which they support their
"claim or title to recover. It is the defendant who has
"pleaded a privilege or exemption under a statute of the
"United States and relies upon it as his only defense. If
"the decision of the State court had been against him, his
"right to have the case re-examined by this court could
"not be doubted. But the decision has been in favor of the
"right set up under the statute, the validity of which has
"been denied by the plaintiffs. We have no jurisdiction to
"entertain a writ of error to the Supreme Court of Ohio
"at their suggestion."

In *Missouri* v. *Andriano*, 138 U. S. 496, 499, Mr. Justice Brown for the court said:—

"Here is clearly a right or privilege claimed by respond-
"ent under a statute of the United States within the mean-

"ing of Revised Statutes, Section 709, and had the judg-"ment of the Supreme Court of Missouri been adverse to "his claim, there could be no doubt of his right to a writ "of error from this court, to review its ruling. It is in-"sisted, however, that the relator has no right to a review "of the ruling in favor of respondent, as he claimed no "right or privilege personal to himself or to his own status "as a citizen from such statute. The question thus pre-"sented is, whether the right or privilege must necessarily "be personal to the plaintiff in error, or whether he is not "entitled to a review where such right or privilege is "asserted by his opponent, and the decision is in favor of "such opponent and adverse to himself. While there is "some force in the argument that the right of review in "cases involving the construction of a federal statute "should be mutual, the act limits such right to cases where "the State court has decided against the title, right, privil-"ege or immunity set up or claimed under the statute."

In *Jersey City & Bergen Railroad* v. *Morgan*, 160 U. S. 288, 292, Mr. Chief Justice Fuller for the court said:—

"The claim which defendant now states it relied on is "that the coin in question was not legal tender under the "law of the United States. This, however, was only a "denial of the claim by plaintiff that the coin was such, "and as, upon the facts determined by the verdict, the "State courts so adjudged, the decision was in favor of and "not against the right thus claimed under the laws of the "United States, if such a right could be treated as involved "in this record, and this court has no jurisdiction to re-"view it."

And to the same effect:—

Linton v. *Stanton*, 12 How. 423;

Manning v. *French*, 133 U. S. 186, 191;

McNulta v. *Lochridge*, 141 U. S. 327, 330;

Texas & Pacific Railway v. *Johnson*, 151 U. S. 81, 98;

De Lamar's Nevada G. M. Co. v. *Nesbitt*, 177 U. S. 523, 528.

The record nowhere discloses any claim of right personal to plaintiffs in error asserted by them under any federal statute.

The denials contained in the answer are formal denials of the allegations of the complaint wherein defendant in error asserted rights under a federal patent issued under the sanction of federal law, and such denials, therefore, fall within the rulings above cited.

Plaintiffs in error allege in their answer "that the defendants are the owners and entitled to all veins, lodes and ledges beneath the surface of the lands and premises described in the complaint as the Toman Ranch," but they fail to connect that claim of ownership in any way with any federal conveyance or statute. A bald claim of title without relating the same in any way to a federal source certainly does not present the case of a right asserted under a federal law.

The bill of exceptions is equally barren of any matter going to show that the lower court denied plaintiffs in error any federal right or that they intended to present such a right to the State Supreme Court for decision on appeal. Plaintiffs in error specify eighteen particulars in which the evidence is insufficient to justify the decision, which specifications in detail refer to the findings of fact made by the trial court.

The first objection is directed to the finding that on November 25, 1873, the United States granted to Hall McAllister the land described in patent and 1165.56 linear feet of the Summit Quartz Mine, vein and all other veins apexing within such surface boundaries with the right to follow the same on their dip, on the ground of insufficiency of evidence, "in this that the evidence shows that the end lines "of the Summit Quartz Mine as patented to Hall McAl- "lister, were not parallel, and the evidence further shows "that the patentee under the patent to the Summit Quartz "Mine had no right to pursue any vein, lode, ledge or "deposit beyond the exterior boundary lines of said Sum- "mit Quartz Mine extended downward vertically." (Printed Transcript, page 76.)

Objection II follows:

"The evidence is insufficient to justify the finding "that by letters patent to the Summit Quartz Mine issued "to Hall McAllister, there was granted to him the rights "to pursue, or the right to any vein beyond the exterior "boundary line of said Summit Quartz Mine extended "downward vertically, in this: That the evidence shows "that the end lines of said Summit Quartz Mine were not "parallel, and that said patent was issued under the laws "of the United States, adopted May 10, 1872, to-wit: 'An "'act to promote the development of the Mining Resources "'of the United States,' which act required that the end "lines should parallel." (Printed Transcript, page 77.)

And objection III:

"The evidence is insufficient to justify the finding that "the patent to the Summit Quartz Mine was issued in "pursuance of and in conformity with the Revised Stat-

"utes of the United States, Title 32, Chapter VI, in this: "That the evidence shows that the said patent to Hall "McAllister was issued under and in pursuance of the "act approved May 10, 1872, entitled: 'An Act to promote "'the development of the Mining Resources of the United "'States.'" (Printed Transcript, page 77.)

The foregoing objections do not amount to the assertion of a Federal question. Their full force and effect is that the findings of the Court, which are equivalent to the verdict of a jury, should have been different under the evidence. This Court will not review questions of fact.

Quimby v. *Boyd,* 128 U. S. 488;
Egan v. *Hart,* 165 U. S. 188, 192;
Dower v. *Richards,* 151 U. S. 658.

Any right possessed by plaintiff in error under the Act of 1872, was conditioned upon the fact that the Summit Mine was located thereunder. The court found the facts to be otherwise. "The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within the operation," said the court in *Crary* v. *Devlin,* 154 U. S. 619. The judgment in this case did not deny any right claimed by plaintiff in error, but at most found that the facts on which such right was claimed did not exist. Such a judgment is not reviewable on this writ.

Crary v. *Devlin, supra;*
Dower v. *Richards,* 151 U. S. 658.

Plaintiffs in error do not anywhere assert that their title to the vein in dispute rests upon the Act of 1872 nor that their title to the Toman Ranch rests upon that or any

other statute. In fact they attack the finding that their title is based upon agricultural patents on the ground:—

"That there is no evidence showing or tending to show "under what patents the defendants are the owners of the "Toman Ranch."

It may be true that plaintiffs in error's joinder of issue with defendant in error, so to speak, on the question of the latter's right under its patent, made necessary a construction of the Act of 1872, as to the rights to be accorded under that act to locators who had laid out their claims and applied for patent prior to the passage of that act, but such must be the inevitable result in all cases wherein one party asserts a right under a federal law and the other party refuses to concede the existence of the same.

In *Kizer* v. *Texarkana & Fort Smith Railway Company*, 179 U. S. 199, 200, the court said:—

"It is not every case where a federal statute has been "construed by a State court that gives a right of review to "this court, but the claim of any right, title, privilege or "immunity under the statute must have been denied by the "State tribunal. * * * That a federal statute was con- "strued unfavorably to one of the parties to the suit is no "ground for jurisdiction by this court, unless such con- "struction was not only unfavorable, but was against the "right, etc., specially set up and claimed under the statute. "In that case the party setting up and claiming the right "under the statute, which has been denied, can obtain a "review here. Thus it might happen, as it has happened "in this case, that, while the decision upon the construction "of the statute was unfavorable to the maintenance of the "cause of action set forth by the plaintiff in error, it was

"not against, but in favor of, the claim made under the "federal statute. The question * * * having been de- "cided in favor of the claim set up by defendant under the "statute, this court has no jurisdiction to review the judg- "ment."

Under this decision and the previously cited cases it seems clear that the record on appeal to the State Supreme Court discloses no question of federal cognizance.

It seems to be settled that the Supreme Court may, on writ of error, consider the opinion filed by the State court for the purpose of determining what questions were decided in that court.

Murdock v. *Memphis,* 20 Wall. 570;

Gross v. *United States Mortgage Co.,* 108 U. S. 477;

Adams County v. *Burlington & Missouri Ry. Co.,* 112 U. S. 123;

Philadelphia Fire Association v. *New York,* 119 U. S. 110;

Dibble v. *Bellingham Bay Co.,* 163 U. S. 63;

Mallett v. *North Carolina,* 181 U. S. 589;

Egan v. *Hart,* 165 U. S. 188;

San Jose Land & Water Co. v. *San Jose Ranch Co.,* 189 U. S. 177.

The following excerpts from the opinion of the State court sufficiently indicate the views of the court with relation to any possible federal question passed on.

"It will be seen from the foregoing that the mining "patent purported, upon its face, to grant to plaintiffs' "predecessors all that portion of the vein of ore which is "here in controversy. (Printed Transcript, page 87.)

"Defendants contend, however, that notwithstanding the

"attempted conveyance, in terms, of the property in dis-
"pute the patent failed to convey any extralateral right by
"reason of the fact that the end lines of plaintiffs' claim
"as located, surveyed, and granted, were not parallel as
"required by the Act of May 10, 1872.

"It appears to be recognized by the authorities that com-
"pliance with the Act of May 10, 1872, that the end lines
"shall be parallel, is essential to the existence of any right
"in the locator or patentee to follow his vein outside of
"the vertical planes down through the side lines in all
"cases where the location was made under such act (*Iron
"S. M. Co.* v. *Elgin M. & L. Co.*, 118 U. S. 196; *Del Monte
"M. & M. Co.* v. *Last Chance M. & M. Co.*, 171 U. S. 55;
"*Argonaut M. Co.* v. *Kennedy M. & M. Co.*, 131 Cal. 15,
"25)."

Again (printed Transcript, page 87) :—

"We are satisfied that, as the locations upon which the
"patent was based were made prior to May 10, 1872, the
"requirement as to parallelism of end lines was not appli-
"cable thereto. It was not until the passage of the Act of
"1872 that there was any such requirement. * * *"

Again (printed Transcript, page 89) :—

"The rights sought by the act to be preserved were such
"rights as had been acquired under the prior acts, by the
"making of a valid location, even though those rights were
"not of such a nature that the government might not, if
"it had seen fit to do so, deprive the locator thereof, and
"the right to obtain a patent in accordance therewith,
"under the provisions of the Act of 1872 was given for
"the reason that the previous laws as to the issuance of
"such patent, were repealed, and there was no other law
"under which a patent could be issued for any such mining
"claim. * * *"

Again (printed Transcript, page 90):—

"It is true that the patent recites on its face that it "is issued in pursuance of the Act of 1872, but it also "recites that it is issued in pursuance of the Act of July "26, 1866, and the Act amendatory thereof approved July "9, 1870, and in conjunction with the public records in "evidence, shows that it was issued upon locations made "prior to May 10, 1872, and upon an application pending "at that date."

The court also held, as previously outlined, that no rights were renounced by the patentee by accepting the added benefits accruing by virtue of the Act of 1872.

The foregoing language of the court shows that no other or different questions were presented to nor decided by the Supreme Court of the State of California, than were involved in the case as presented to the Superior Court of Amador County. The only federal right claimed in or decided by the Supreme Court was that claimed by defendant in error, and the only construction of a federal statute made, was rendered necessary because of defendant in error's claim of right thereunder.

The decision upon the question of renunciation of rights under one law by acceptance of added benefits under another is, we submit, a question of general law; a question of waiver or estoppel which is not one of the nature requisite to confer jurisdiction upon this court.

Gillis v. *Stinchfield,* 159 U. S. 658;
Beals v. *Cone,* 188 U. S. 186;
Speed v. *McCarthy,* 181 U. S. 269;

Eustis v. *Bolles,* 150 U. S. 361;
Beaupre v. *Noyes,* 138 U. S. 397.

Plaintiffs in error claimed the ore bodies in dispute by virtue of their ownership of the overlying surface of the Toman Ranch. Inasmuch as their agricultural patents excluded from the grant all veins of ore apexing outside the surface boundaries, their claim to the bodies in question was nothing more than the assertion of a common law right.

Now a common law right is not a matter of federal cognizance, but is a question for local decision. There is "no common law of the United States" separate and apart from that of the States.

Wheaton v. *Peters,* 8 Pet. 638, 657.

"When, therefore, a common law right is asserted, we must look to the State in which the controversy originated."

Id., 8 Pet. 657.

Nor does the fact that the common law right claimed is an incident of a federal grant of property within a State change the character of the question.

Packer v. *Bird,* 137 U. S. 661, at page 669, Mr. Justice Field in the opinion of the court said:—

"The courts of the United States will construe the grants "of the general government without reference to the rules "of construction adopted by the States for their grants; "but whatever incidents or rights attach to the ownership "of property conveyed by the government will be deter- "mined by the States, subject to the condition that their

"rules do not impair the efficacy of the grants or the use "or the enjoyment of the property by the grantee. As an "incident of such ownership the right of the riparian "owner, where the waters are above the influence of the "tide, will be limited according to the law of the State "either to low or high-water mark, or will extend to the "middle of the stream."

It seems clear from the record that there was not asserted by the plaintiffs in error below nor decided by the State court adversely to them any federal rights personal to the plaintiffs in error. They nowhere claimed that any federal statute or patent issued thereunder confirmed or conveyed to them the property in suit. It would seem that no construction of any federal statute could possibly vest in them title to property which their patent expressly excepts from the grant. The only federal statute which was construed, however, was not one under which plaintiffs in error claimed title, but was the Act of 1872 and especially the portions thereof which repealed the Act of 1866 but purported to preserve to existing locators the rights acquired by their locations. This was the act under which the patent of defendant in error finally issued and the construction thereof was rendered necessary by the assertion of right thereunder by defendant in error, and was favorable to the right thus asserted, hence cannot form the basis for a writ of error.

II.

BUT EVEN IF THERE WAS INVOLVED A QUESTION WHICH MIGHT HAVE BEEN MADE THE BASIS OF A WRIT OF ERROR PLAINTIFFS IN ERROR FAILED TO SET UP THE SAME WITH THAT DEGREE OF PARTICULARITY AND DEFINITENESS WHICH THE THIRD DIVISION OF SECTION 709, AS CONSTRUED BY THIS COURT, DEMANDS.

In *Spies* v. *Illinois*, 123 U. S. 131, 181, the court said:—

"To give us jurisdiction under Section 709 of the Re-
"vised Statutes because of the denial by a State court of
"any title, right, privilege or immunity claimed under the
"Constitution, or any treaty or statute of the United
"States, it must appear on the record that such title, right,
"privilege or immunity was 'specially set up or claimed'
"at the proper time in the proper way. To be reviewable
"here the decision must be against the right so *set up or*
"*claimed.* As the Supreme Court of the State was review-
"ing the decision of the trial court, it must appear that the
"claim was made in that court, because the Supreme Court
"was only authorized to review the judgment for errors
"committed there, and we can do no more."

And to the same effect:—

Brooks v. *Missouri*, 124 U. S. 394, 395;
French v. *Hopkins*, 124 U. S. 524;
Chappel v. *Bradshaw*, 124 U. S. 132, 134;
Baldwin v. *Kansas*, 129 U. S. 52, 57;
Texas Ry. Co. v. *Southern Pac. Co.*, 137 U. S. 48;

Leeper v. *Texas*, 139 U. S. 462;
Roby v. *Colehour*, 140 U. S. 153, 159;
Schuyler Nat'l Bank v. *Bollong*, 150 U. S. 85, 88;
Zadig v. *Baldwin*, 166 U. S. 486, 488.

"A definite issue as to the possession of the right must "be distinctly deducible from the record before the State "court can be held to have disposed of such federal ques- "tion by the decision."

Powell v. *Brunswick County*, 150 U. S. 400, 433;
Sayward v. *Denny*, 164 U. S. 454, 457;
Louisville & N. Rd. v. *Louisville*, 166 U. S. 709, 714, 715.

And in *Oxley Stave Co.* v. *Butler County*, 166 U. S. 649, 653, and 655:—

"The words 'specially set up or claimed' imply that if a "party intends to invoke for the protection of his rights "the Constitution of the United States, he must so declare; "and unless he does so declare 'specially,' that is, unmis- "takably, this court is without authority to re-examine "the final judgment of the State court. This statutory "requirement is not met if such declaration is so general "in its character that the purpose of the party to assert "a federal right is left to mere inference. It is the settled "doctrine of this court that the jurisdiction of the circuit "courts of the United States must appear affirmatievly "from the record, and that it is not sufficient that it may be "inferred argumentatively from the facts stated."

Keokuk & H. Bridge Co. v. *Illinois*, 175 U. S. 626.

And in *Kipley* v. *Illinois*, 170 U. S. 182, 186:—

"Our jurisdiction cannot arise in such case from infer-

"ence, but only from averments so distinct and positive "as to place it beyond question that the party bringing the "case up intended to assert a federal right."

In *Green Bay, etc., Canal Co.* v. *Patten Paper Co.*, 172 U. S. 66, 67, 68, the court said:—

"There is a class of cases wherein it has been held and "laid down as settled doctrine that 'the revisory power of " 'this court does not extend to rights denied by the final " 'judgment of the highest court of a State, unless the " 'party claiming such rights plainly and distinctly indi- " 'cated, before the State court disposed of the case, that " 'they were claimed under the Constitution, treaties or " 'statutes of the United States; that if a party intends to " 'invoke for the protection of his rights the Constitution " 'of the United States, or some treaty, statute, commission " 'or authority of the United States, he must so declare; " 'and unless he does so declare "specially," that is, un- " 'mistakably, this court is without authority to re-examine " 'the final judgment of the State court, that this statutory " 'requirement is not met if such declaration is so general " 'in its character that the purpose of the party to assert " 'a federal right is left to mere inference.' "

These cases speak in terms that cannot be misunderstood. The record must show that there was a direct issue made in the State court as to a federal right. The party asserting such right must have set forth his claim in such an unmistakable manner that the State court could not fail to observe that he relied upon such federal right.

What constitutes the record?

Clearly the record includes the pleadings in the cause, the judgment of the trial court and the bill of exceptions.

The decision in *Spies* v. *Illinois*, above quoted would

indicate that it includes nothing more; that the record of the case on appeal from the trial court is the *record* wherein the claim of federal right must be disclosed.

And in the late case of *Harding* v. *Illinois,* 196 U. S. 78, 84, Mr. Justice Day delivering the opinion of the court said: "We try the case upon the duly certified record "legally made in the State court, *and upon which its "decision rests."*

The decision must, in the nature of things, rest upon matters preceding it. A court cannot properly decide questions not involved in the pleadings nor in the proceedings had prior to rendition of judgment. A decision disposing of such questions would not "rest" upon the record in the case in the sense in which the court used that term in *Harding* v. *Illinois.*

In *Home For Incurables* v. *City of New York,* 187 U. S. 155, 157, Mr. Justice Harlan for the court said:—

"Later cases in this court have expressed the additional "thought that if the highest court of the State assumes "that the record sufficiently presents a question of federal "right and decides against the party claiming such right, "we will look no further and will proceed to a considera- "tion of that question, unless the decision is made to rest, "in part, upon some ground of local law, sufficient enough "in itself to sustain the judgment, independently of any "question of federal right."

The record must still show that the plaintiff in error asserted and intended to rely upon the matter of federal right which was considered by the court and decided against him.

In the late case of *Michigan Sugar Co.* v. *Michigan*, 185 U. S. 112, 113, 114, the court said:—

"The rule is firmly established, and has been frequently "reiterated, that the jurisdiction of this court to re- "examine the final judgment of a State court, under the "third division of Section 709, cannot arise from mere "inference, but only from averments so distinct and posi- "tive as to place it beyond question that the party bringing "the case here from such court intended to assert a federal "right. The statutory requirement is not met unless the "party unmistakably declares that he invokes for the pro- "tection of his rights, the Constitution, or some treaty, "statute, commission or authority, of the United States. "Applying this rule to the case before us, a writ of error "cannot be maintained."

And in *Chicago I. & L. Ry.* v. *McGuire*, 196 U. S. 128:—

"There are doubtless a few cases which hold that, where "the validity of a treaty or statute, or authority of the "United States is raised, and the decision is against it, or "the validity of a State statute is drawn in question, and "the decision is in favor of its validity, and the federal "question appears in the record and was decided, or such "decision was necessarily involved in the case, the fact "that it was not specifically set up and claimed is not "conclusive against a review of such question here. "*Columbia Water Power Co.* v. *Street R. Light & P. Co.*, "172 U. S. 475, 488, * * * But as the validity of no "statute, State or federal or authority thereunder, was "called in question here, this rule does not apply. The "true and rational rule stated by this court in *Bridge "Proprietors* v. *Hoboken Land & Improvement Co.*, 1 Wall. "116, 145. * * * is clearly applicable: 'that the court "'must be able to see clearly from the whole record that

"'a certain provision of the Constitution or Act of Con-
"'gress was relied upon by the party who brings the writ
"'of error, and that the right thus claimed by him was
"'denied.' This case is the not infrequent one of an
"attempt to clutch at the jurisdiction of this court as an
"afterthought, when all other resources of litigation have
"been exhausted."

In the petition to the State Supreme Court for writ of error to this court and in the assignment of errors accompanying the same, there is a wholesale assertion of federal rights claimed to have been set up in the State courts by petitioners and denied by the decisions. That neither petition nor assignment of errors forms any portion of the record on this writ is settled beyond question by the decisions of this court.

In *Warfield* v. *Chaffe*, 91 U. S. 690, 692, Mr. Chief Justice Waite said: "The petition for the allowance of the writ "in this court is not part of the record of the court below. "We act only upon that record."

And to the same effect are:—

Clarke v. *Pennsylvania*, 128 U. S. 394, 397;
Manning v. *French*, 133 U. S. 186, 192;
Butler v. *Gage*, 138 U. S. 52, 56;
Leeper v. *Texas*, 139 U. S. 462;
Sayward v. *Denny*, 158 U. S. 180;
Mutual Life Ins. Co. v. *McGrew*, 188 U. S. 308;
Chicago, etc., Ry. Co. v. *McGuire*, 196 U. S. 128, 132;
French v. *Taylor*, 26 Supreme Court Rept. 76, 78.

As to the assignment of errors, Mr. Chief Justice Fuller for the court in *Missouri Pac. Ry.* v. *Fitzgerald*, 160 U. S.

566, 578, said: "An assignment of errors cannot be availed "of to import questions into a cause which the record does "not show where raised and passed upon in the court "below."

And it was so held in:—

Ansbro v. *United States,* 159 U. S. 695, 697, 698;
Cornell v. *Green,* 163 U. S. 75, 80;
Chapin v. *Fye,* 179 U. S. 128, 130;
New York Central v. *New York,* 186 U. S. 269, 273;
French v. *Taylor,* supra.

Under any view of the authorities this writ of error should be dismissed.

The record of the proceedings prior to the decision in the State Supreme Court shows that plaintiff in error herein specially set up and claimed no right of the character enumerated in division three of Revised Statutes, Section 709. At most the record shows that they took issue with defendant in error upon the rights asserted by the latter under its patent, which, under the decisions of this court previously cited, is clearly insufficient to give this court jurisdiction.

The opinion of the State Supreme Court shows that no questions other than those presented in the record on appeal were deemed by that court to be before it for decision. That opinion, therefore, does not help the case for plaintiff in error.

The assignment of errors and the acompanying petition for the writ with the omnibus enumeration of rights under the Constitution and laws of the United States, asserted

therein, and claimed for the first time, comes too late to supplement the record.

We submit that, to use the language of this court, "this "case is the not infrequent one of an attempt to clutch at "the jurisdiction of this court as an afterthought when all "other resources of litigation have been exhausted."

Chicago, etc., Ry. v. *McGuire,* 196 U. S. 128.

We respectfully urge that the writ of error should be dismissed.

Respectfully submitted,

CURTIS H. LINDLEY,

HENRY EICKHOFF,

Counsel for Defendant in Error.

Received copy of the foregoing motion and brief of 26 pages this 12th day of February, 1906.

PHILIP G. GALPIN,

Attorney for Plaintiffs in Error.

FILE COPY.

No. 141.

In the Supreme Court

OF THE

United States

Office Supreme Court,
FILED.
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JAMES H. McKEN

OCTOBER TERM 1906.

EAST CENTRAL EUREKA MINING COMPANY (A CORPORATION), JAMES TOMAN AND ELIZA A. TOMAN,
Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

CURTIS H. LINDLEY,
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The Hicks-Judd Co., Print., 270-284 Valencia St., S. F., Cal.

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vs.

CENTRAL EUREKA MINING COMPANY, a corporation,
Defendant in Error,

BRIEF OF DEFENDANT IN ERROR

In this cause the Defendant in Error heretofore presented to this court a motion to dismiss the writ of error, presenting in that behalf a

printed argument in support thereof. By order of this court the further consideration of the motion was continued to the hearing on the merits. We respectfully invite the court's attention to the argument heretofore filed, and also submit during the course of the following brief such supplemental suggestions in that behalf as may seem pertinent to the question of jurisdiction of this Court.

STATEMENT OF THE CASE.

This is an action to quiet the title of Defendant in Error to the Summit Quartz Mine and the vein having its top or apex therein, and was brought pursuant to Section 738 of the Code of Civil Procedure of the State of California, which provides:

> "An action may be brought by any person "against another who claims an estate or in- "terest in real property adverse to him for "the purpose of determining such adverse "claim * * *."

The facts of the case as shown by the record and the several contentions of the respective parties may be best outlined by reference to a diagram (Figure 1) which is based upon the exhibits used at the trial and represents the physical conditions concerning which there is no controversy.

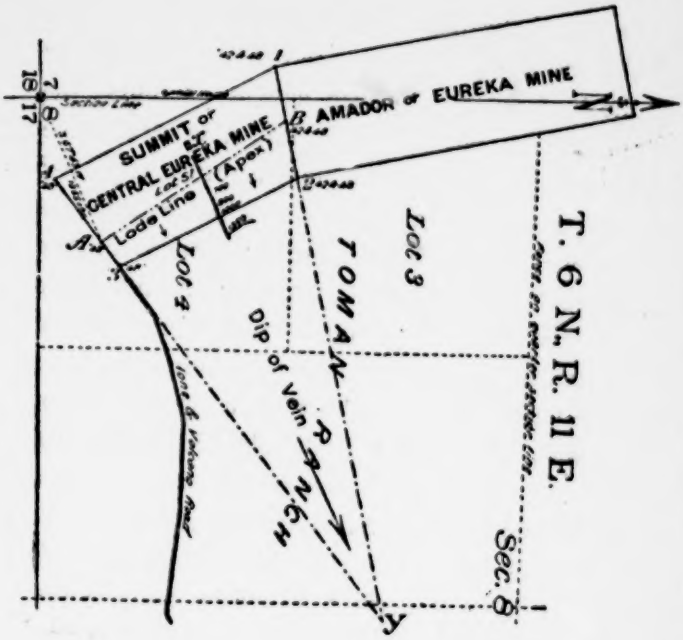


Figure 1.

The diagram shows the exterior boundaries of the Summit Quartz Mine (the lines connecting the corners 1, 2, 3, 4); also the position and course of the apex of the vein through the claim—the line A-B marked "Lode line (apex)." The lines of the claim which are crossed by the lode on its course and which therefore are the end lines in law, are those numbered respectively 4-3 and 1-2.

The downward course of the vein between the

extended end line planes is eastwardly in the direction indicated by the arrows—the angle of the dip being approximately 63 degrees below the horizontal. On such downward course the vein passes out of and beyond a vertical plane drawn through the East side line of the claim 3-2 and enters into and penetrates underneath the surface of the lands adjoining marked on the figure "Toman Ranch". There is no controversy over the title to the surface of the Summit Quartz Mine, or anything thereunder within its vertical boundaries. The end lines of the claim are not parallel, but converge in the direction of the dip, the extralateral extensions intersecting on a line represented in plan, on Figure 1, by the letter Y.

The title of Defendant in Error to the Summit Quartz Mine is derived by mesne conveyances, from Hall McAllister, the patentee from the government. This patent was isued November 25, 1873. It was based upon two mining locations made respectively in 1863 and 1865. (Findings of Fact, Record, folio 43.)

Application for patent was made February 7, 1871, (Record fol. 69), under the act of July 26, 1866, commonly known as the "Lode and Water Law", and such application was pending in the local land office at the time of the passage of the act of May 10, 1872. Final entry and payment were made October 11, 1872. The Register's final certificate of entry (Record, fol.

67), shows that such entry was made under the Act of 1866 and the Amendatory Act of 1870. The patent with the plat attached is set forth in full in the Record (folios 57-63.) It recites the entry to have been made pursuant to the Act of 1866, the Amendatory Act of 1870 and the Act of May 10, 1872, which latter act, as we will hereafter point out, preserved all rights theretofore existing, and all proceedings then pending upon applications for patents. Defendant in Error claims title to all that segment of the vein lying underneath the Toman Ranch, found within vertical planes drawn through the end lines of the Summit Quartz Mine and those lines produced in their own direction to the line of intersection at "Y."

Plaintiffs in Error, the Tomans, own the Toman Ranch by title derived through Government patents issued to their predecessors in title. One patent was issued December 1st, 1876, and the other August 20th, 1878, and both were made under the laws of the United States providing for the sale and disposition of what is known as "Agricultural Lands." Both said patents contain a limitation upon the Estate granted by the United States, giving the right to the proprietor of a vein or ledge "to extract and remove his ore "therefrom, should the same be found to pen- "etrate or intersect the premises hereby "granted." (Findings of Fact, Record, folio 44.)

Priority of title, if that be a matter of moment in this inquiry, is with Defendant in Error. The Agricultural Patents of Plaintiffs in Error are junior in point of time to the Mining patent under which Defendant in Error claims.

At the trial Plaintiffs in Error also offered in evidence what purported to be a quitclaim deed executed by Defendant in Error, dated December 31, 1898, conveying by the usual terms employed in that class of instrument a tract of land (among others not here involved) described as follows:

> " That portion of Sections eight and seven-
> " teen, Township Six (6) North, range
> " eleven (11) East Mt. Diablo base and meri-
> " dian, lying North of the center of that certain
> " wagon road extending between the town of
> " Ione and Volcano and known as the Ione
> " and Volcano Wagon Road and *lying East*
> " *of that certain patented mining ground*
> " *known as the Summit Quartz Mine*, and also
> " east of that patented mining ground known
> " as the Amador Consolidated Mine." Record, folio 162.

This describes what we call the Toman Ranch, and its situs, so far as it is essential to exhibit it for the purposes of this case, is shown on Figure 1, *ante*. The full boundaries are shown on plat marked Exhibit A, opposite page 10 of the Record.

It is not claimed that Defendant ever had any

title to the Toman Ranch connected with the paramount source. It appears from the resolution of the Board of Directors of Defendant in Error authorizing its execution, that this quitclaim deed was given for the purpose of extinguishing certain equities then existing in favor of Defendant in Error, arising out of a certain contract-bond or option to purchase the Toman Ranch from Plaintiffs in Error, the Tomans, who at all times were and still are the owners of the legal title to said ranch.

These are the essential facts. They may require elaboration in the course of the argument, but the foregoing statement will serve the present purposes.

CONTENTION OF PLAINTIFFS IN ERROR

Plaintiffs in Error contended in the court below, which contentions are renewed here, as follows:

1. That the end lines of the Summit Quartz Mine are not parallel. That the Act of May 10, 1872, which was in force at the time the patent was issued, required such parallelism as a condition precedent to the exercise of the extralateral right. Therefore that the Defendant in Error could not follow the vein on its downward course out of and beyond a vertical plane drawn through the East side line of the claim. That such part of the vein as

was underneath the surface of the Toman Ranch belonged to Plaintiffs in Error as the owner of such surface.

2. That, conceding that the patent for the Summit Quartz Mine conveyed an extralateral right, the quitclaim deed executed by the respondent describing the Toman Ranch operated to divest it of all title to so much of the vein as was underneath the surface of the property quitclaimed, to-wit, the Toman Ranch.

CONTENTION OF DEFENDANT IN ERROR.

Defendant in Error contended in the court below, and here contends, as follows:

1. That the title to the Summit Quartz Mine related back to the inception of the right, i. e., the locations in 1863 and 1865. Application for patent was made under the Act of 1866, and was pending in the local land office at the time of the passage of the Act of May 10, 1872. Under the Act of 1866, and under local customs in existence prior thereto, end lines were not required to be parallel. The Act of 1872 in terms preserved and confirmed pre-existing rights. The provisions therein contained as to parallelism of end lines was prospective only in its operation and not retroactive. The owners of the Summit claim had, prior to the passage of the Act of 1872, the right to follow the vein on its downward course, between its extended end line planes, out of

and beyond the vertical east side line plane and underneath the Toman Ranch. This right was confirmed by the Act of May 10, 1872.

2. If this be not true, and we are to consider that the rights of Defendant in Error are to be determined by the proper construction of the provision of the Act of May 10, 1872, requiring end lines to be parallel, the end lines of the Summit Quartz Mine converge in the direction of the dip. The object of parallelism is to prevent a lode locator from obtaining in depth beyond his vertical boundaries more of the vein in length than he has within his boundaries. As with converging end lines, the lode locator acquires less in length along the vein in depth than he has at the surface, the reason of the rule ceases. So should the rule.

3. The grant of the vein throughout its entire depth between the end line planes of the Summit Quartz Mine extended, severed the title to that part of the vein lying underneath the surface of the Toman Ranch from the title to the surface. The vein between these planes was essentially a part of the Summit Quartz Mine. It is not, nor was it ever a part of the Toman Ranch, and title to it could not pass by a deed, quitclaim or grant, describing simply the Toman Ranch or its boundaries. The underlying vein was no part of the Toman Ranch. The description contained in the quitclaim deed, "All "that portion . . . lying east of that certain

"patented mining ground known as the "Summit Quartz Mine," excludes from the operation of the instrument, all that was conveyed and patented by the mining patent for the Summit Quartz Mine.

4. An examination of the quitclaim deed in the light of the surrounding circumstances, the different character of the two properties and the apparent motive for the conveyance, discloses a manifest intent not to convey to the plaintiffs in error any part of the property which belonged to the defendant in error by virtue of its patent to the Summit Quartz Mine.

THE DECISION OF THE SUPREME COURT OF CALIFORNIA.

Upon these facts and contentions, the Supreme Court of California decided in substance as follows:

1. Under the Act of 1866 end lines were not required to be parallel. The locations on the Summit vein having been made prior to the passage of the Act of 1872, the fact that the end lines were not parallel did not deprive the locator of the extra lateral right between the converging end line planes. The intention of Congress in passing the Act of 1872 was to preserve to the prior locator everything that his location would have given him had the Act of 1872 not been enacted. and to confer additional rights. Applications for patent having been made under the

Act of 1866, under which act end lines were not required to be parallel, it was left to the Land Department to determine as to any such alleged prior location, what the rights of the locator were under the previous Acts and in accordance with the procedure laid down by the Act of 1872, to issue a patent conveying the title of the Government so far as might be necessary to effectuate such rights.

2. Those parts of the Summit vein underlying the Toman Ranch were no part of that Ranch. Title to such vein had been severed from the title to the land, and the vein did not pass under the quitclaim deed from the defendant in error to the plaintiff in error.

3. From an examination of the deed in question in the light of the circumstances surrounding its execution as disclosed by the record, it is apparent that there was no intention to convey any part of the mining claim.

The decree of the trial court in favor of defendant in error was affirmed.

The opinion appears on pages 86-93.

Petition for rehearing in bank was denied. (Record, fol. 220.)

THE ASSIGNMENTS OF ERROR.

These are five in number. Assuming that this court has jurisdiction, the case before the court may be briefly epitomized.

1. What rights in the Summit vein underneath the surface of the Toman Ranch accrued to the patentees of the Summit Mine?

2. Assuming that defendant in error owned the vein underneath the Toman Ranch, was any part of it conveyed to plaintiffs in error, by the quitclaim deed?

FEDERAL QUESTION.

On the foregoing analysis of the facts and contentions of the parties and the record before this court, we again refer to the jurisdictional question, and our motion to dismiss the writ of error.

No where in the record was any federal question raised in the lower courts by plaintiff in error. There is no federal question stated unless we refer to that part of the opinion of the Supreme Court of the State of California which describes rights which accrued to *Defendant in Error* under its mining patent. The plaintiffs in error never specially set up or claimed in the State Courts any right, title or immunity under any Federal Statute by any controverted construction of which they might be denied such right, title or immunity or the same might in any way suffer impairment or diminution. The first specific announcement of any such claim appears in their assignments of error in this court. The mere fact that the Supreme Court of the State of California discussed in its opinion the alleged infirmities of defendant in error's title, is, we respectfully submit, not a sufficient foundation

on which to predicate a writ of error from this court at the instigation of plaintiff in error.

The stress of the claim of plaintiff in error seems to have rested upon the deed and its construction by the State Courts. This certainly involves no federal question.

The ruling of the State Courts as to what passed by the deed, was of itself practically decisive of the whole controversy. With these supplemental suggestions as to our motion to dismiss we pass to the consideration of the case on its merits.

ARGUMENT.

The Property Rights Conveyed by the Patent to the Summit Quartz Mine Located under the Lode and Water Law of July 26, 1866.

As the rights of defendant in error had their origin in locations antedating the passage of the Act of May 10th, 1872, application for a United States patent having been instituted under the Act of 1866, it is pertinent to inquire, what rights had accrued to the locator and patent applicant at the time of the passage of the Act of 1872, and to what extent were the previously existing rights affected by the passage of that Act?

There is within the surface boundaries of the Summit Mine 1165.56 linear feet of the apex of the vein. The locations upon which the patent proceedings were based, and upon which the

patent was issued, were made at a time when the lode or vein was the thing acquired by location and the surface adjacent thereto a mere incident. This was the rule under the first mining law passed by Congress, known as the "Lode and Water Law," which went into effect July 26, 1866,

(14 U. S. Stats. at Large, p. 451),

under which act patent for the Summit Mine was applied for.

This act was but a crystallization of the miners' rules and customs which prior to Congressional action formed the Pacific Coast common law of mines.

Jennison v. *Kirk,* 98 U. S. 453, 456;
Broder v. *Natoma Water Co.,* 101 U. S. 274, 276;
Chambers v. *Harrington,* 111 U. S. 350, 352;
N. P. R. R. v. *Sanders,* 166 U. S. 620, 634.

Under the local rules, as well as under the Act of 1866 the lode was the principal thing and the surface was in reality an incident.

Johnson v. *Parks,* 10 Cal. 447, 449;
Patterson v. *Hitchcock,* 3 Colo. 533, 534;
Wolfley v. *Lebanon Min. Co.,* 4 Colo. 112, 116;
Walrath v. *Champion M. Co.,* 63 Fed. 552, 556.

Upon this subject we may quote with profit from a decision by this court, speaking through Justice Brewer:

"The purpose herein (the Act of 1866) "manifested was the conveyance of the vein, "and not the conveyance of a certain area "of land, within which was the vein. . . . "Nowhere was there any express limitation "as to the amount of land to be conveyed. . . . "Obviously, the statute contemplated the pat- "enting of a certain number of feet of the par- "ticular vein claimed by the locator, no mat- "ter how irregular its course, made no provis- "ion as to the surface area, or the form of the "surface location, leaving the land depart- "ment in each particular case to grant so "much of the surface 'as was fixed by local "'rules', or was, in the absence of such rules, "in its judgment necessary for the conven- "ient working of the mine."

"As might be expected, the patents issued "under this statute described surface areas "very different, and sometimes irregular in "form. Often they were like a broom, there "being around the discovery shaft an amount "of ground deemed large enough for the con- "venient working of the mine, and a narrow "strip extending therefrom as a handle of the "broom. This strip might be straight, or in "a curved irregular line, following, as was "supposed, the course of the vein. Sometimes "the surface claimed and patented was a tract "of considerable size, so claimed with the "view of including the apex of the vein, in

"whatever direction subsequent explorations "might show it to run. And again, where "there were local rules, giving to the dis- "coverer of a mine possessory rights in a cer- "tain area of surface the patent followed "those rules and conveyed a similar area."

Del Monte M. and M. Co. v. *Last Chance M. Co.*, 171 U. S. 55, 64.

As was said by Justice Field sitting as Circuit Justice:

"It is true, as stated by the defendant, that "the surface land taken up in connection "with a linear location on the ledge or lode "is under the Act of 1866 intended solely "for the convenient working of the mine and "does not measure the miner's right either "to the linear feet upon its course or to fol- "low the dips, angles, and variations of the "vein or control the direction he shall take."

Eureka Case, 4 Sawy. 302, 323.

Before patent if no attempt was made to inclose the lode within surface boundaries the locator might pursue it in its course or strike to the extent of the number of feet claimed. The notice of location usually called for so many feet on the vein and a misdescription as to its course did not vitiate the location. The locator had a right prior to patent to follow it wherever it ran.

Johnson v. *Parks*, 10 Cal. 447, 449.

The locator could hold out one lode or vein.

Del Monte M. & M. Co. v. *Last Chance M. Co.*, 171 U. S. 55, 65.
Walrath v. *Champion M. Co.*, 63 Fed. 552;
Eureka Case, 4 Sawy. 302, 323;
Eclipse G. & S. M. Co., v. *Spring*, 59 Cal. 304, 305.

A patent could be issued but for one vein.

Walrath v. *Champion M. Co.*, 171 U. S. 293, 305.

End lines at the surface were implied in the sense that they marked the limits on the vein beyond which the miner could not go on the strike or course of the vein.

If the locator inclosed his vein within defined surface boundaries, he could not follow his vein on its course outside of such boundaries.

Flagstaff v. *Tarbet*, 98 U. S. 463;
McCormick v. *Varney*, 2 Utah 355;
Wolfley v. *Lebanon*, 4 Colo. 112;
Johnson v. *Buell*, 4 Colo. 557.

"Under the Act of 1866 parallelism in "end lines of a surface location was not "required."

Iron Silver M. Co. v. *Elgin M. & S. Co.*, 118 U. S. 196, 208.

Whenever and wherever the question of the nature and extent of extra lateral right as it

existed under the local rules and customs and under the Act of 1866 has been under discussion in the courts, both Federal and State, the foregoing principle has been clearly enunciated, as the following excerpts from the opinions will show:

"In the first place it does not appear upon "what locations the patents were issued. "They may have been and probably were "issued upon locations made under the Act "of 1866 where such parallelism in the "end lines of surface locations was not "required.

Judge Field in Eureka Case, 4 Sawy. 302, 319; affirmed 103 U. S. 839, 847.

"Under the Act of 1866 parallelism of "end lines was not required."

Walrath v. *Champion Co.*, 63 Fed. 552, 556.

"The location was made under the law "of 1866 which did not require parallelism "of end lines."

Con. Wyoming G. M. Co. v. *Champion M. Co.*, 63 Fed. 540, 550.

"When these locations were made there "was no law requiring such parallelism."

Carson City G. & S. M. Co. v. *North Star M. Co.*, 73 Fed. 597, 599.

"The Act of 1866, under the provisions "of which the patent in this case was ap-

"plied for and under which the rights of "defendant in error accrued, did not re- "quire parallelism of end lines."

Carson City G. & S. M. Co. v. *North Star M. Co.* (C. C. A.), 83 Fed. 658, 969;

Certiorari denied by this Court, May, 1898.

"Parallel end lines were not required in "locations by the law of 1866 and yet ex- "tralateral rights were specifically given."

Argonaut Min. Co. v. *Kennedy M. Co.*, 131 Cal. 15, 25.

Clearly if the patent to the Summit Mine had been actually issued prior to the passage of the Act of May 10th, 1872, there would be no question as to the right of the Patentee to follow the vein on its downward course underneath the surface of the Toman Ranch, an agricultural grant junior in point of time to the mineral patent.

"It is not disputed," says the Supreme Court of California in its opinion in this case, "that had the patent issued prior to the "passage of such act it would have conveyed "the extralateral right between the converg- "ing end planes."

Opinion Record, p. 88, fol. 201.

Plaintiffs in error in their brief, p. 16, says:

"Of course if McAllister (patentee of "the Summit claim, and predecessor in title "of defendant in error) had acquired vested "rights to an extralateral right on the ledge, "Congress could not take it away by repeal- "ing the Act of 1866 or any part of it."

But counsel say that no vested right had accrued because the Surveyor General had not at the date of the passage of the act approved the survey. The vice of this suggestion is apparent. A right became vested by location—not by approval of the survey. The surveyor's duty was limited to a survey of the location as claimed by the patent applicant. The approval of the survey was simply an incidental step in the patent proceeding.

This Court has twice said: "A lode locator acquires a vested property right by virtue of his location."

Clipper M. Co. v. *Eli M. Co.*, 194 U. S. 220.

Creede and Cripple Creek M. Co. v. *Uinta Tunnel Co.*, 196 U. S. 337, 342.

At this juncture a brief summary of the Act of 1866 with regard to patent applications and a statement of the status of the application for patent for the Summit Quartz Mine at the date of the passage of the Act of May 10, 1872, may be pertinent.

The order of proceedings to obtain patent for

a quartz mining claim under the Act of 1866 were as follows:

1. The filing by the applicant in the local land office of a diagram of the claim "so ex- "tended laterally or otherwise as to conform "to the local laws, customs and rules of "miners."

2. The posting of the diagram on the claim with the notice of intention to apply for patent also posting in the Register's office.

3. Publication of notice of such application by the Register for 90 days.

After the expiration of this period, if there were no adverse claims, it was the duty of the Surveyor General to survey the premises and approve the plat. Upon such approval and filing with the Register, the applicant might enter and purchase the same.

Act of July 26, 1866, secs. 2 and 3, 14 Stat. at Large, chap. 262, p. 251.

The record shows that prior to October 30, 1871, the provisions of the laws as to posting and publication had been complied with and that there were no adverse claims.

Register's Certificate Record, p. 53.

The claim was surveyed by the Surveyor General's deputy January 22, 1872.

So that when the Act of May 10, 1872, was passed the proceeding *in rem* so far as exclud-

ing adverse claimants were concerned and the actual survey in the field had been perfected. Thereafter the matter took its course by gravity until the issuance of the patent.

The Act of May 10, 1872 and its effect on the rights of the owner of the Summit Mine therefore acquired.

It is pertinent to inquire to what extent, if any, did the Act of May 10, 1872, either impair the rights of the locators of the Summit Mine previously acquired or impose upon them additional burdens as to rectification of lines, and commencing patent proceedings *de noro.*

That the Act of May 10, 1872, was a radical departure from the previous law—not only as to the manner of making locations but as to the patent proceeding.

Under the Act of 1872 the miner locates a surface which must be so defined as to include the top or apex of his lode. Failing in this he obtains practically nothing. If he mistakes the course of his vein it is his loss. He can only hold the vein on its course to the extent that the top or apex thereof is found within his boundaries.

> *Del Monte M. & M. Co.* v. *Last Chance M. Co.*, 171 U. S. 55, 84.

He may thus acquire a superficies 1500 feet in length by 600 feet in width if local regulations do not restrict these measurements.

In other words under the old law he located

the lode with such area adjacent to it as might be necessary for its convenient working or as might be permitted under local rules. Under the new he must locate a piece of land containing the top or apex of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made the location must be of a piece of land including the top or apex of the vein. The end lines of his location must be parallel and cross wise of the vein, otherwise he cannot pursue his lode or lodes on their downward course beyond his vertical side line planes.

> *Del Monte M. & M. Co.* v. *Last Chance M. Co.*, 171 U. S. 55, 88;
> *Calhoun G. M. Co.* v. *Ajax G. M. Co.*, 182 U. S. 499, 508.

Under the old law he could acquire but one vein. Under the new he acquired all other veins having their tops or apices within the surface of boundaries of the location, the extralateral rights on all veins being defined by the same set of end line planes.

> *Walrath* v. *Champion M. Co.*, 171 U. S. 293.

The law also gives to claims previously located all such other veins the tops or apices of which may be found within the location.

Before discussing these "other veins," if found, within these prior claims let us consider briefly

the effect of the Act of 1872 upon previously acquired rights.

No one can read the provisions of the Act of May 10th, 1872, without being impressed with the extreme care manifested by Congress in the preservation of pre-existing rights. In three different parts of the Act we find carefully expressed phrases protecting all rights previously acquired under existing laws. We quote the following from the Act:

Section 9 provided as follows (italics are ours):

> "That sections one, two, three, four and "six of an Act granting the right of way to "ditch and canal owners over the public "lands and for other purposes, approved "July 26, 1866, are hereby repealed, *but "such repeal shall not affect existing rights.* "Applications for patents for mining claims "now pending may be prosecuted to a final "decision in the General Land Office but in "such cases, where adverse rights are not "affected thereby, patents may issue in "pursuance of the provisions of this Act. "And all patents for mining claims hereto-"fore issued under the Act of July 26, 1866, "shall convey all the rights and privileges "conferred by this Act where no adverse "rights exist at the time of the passage of "this Act."

In section 12 we find the following:

> "Nothing in this Act shall be construed

"to enlarge or affect the rights of either "party in regard to any property in con- "troversy at the time of the passage of the "Act entitled 'An Act granting the right of "'way to ditch and canal owners over the "'public lands and for other purposes, ap- "proved July 26, 1866, *nor shall this Act "affect any right acquired under said Act.*"

And section 16 provides:

"That all acts and parts of acts incon- "sistent herewith are hereby repealed; *pro- "vided that nothing contained in this Act "shall be construed to impair in any way "rights or interests in mining property ac- "quired under existing laws.*"

Act of May 10, 1872, 17 Stat. at Large, chap. 152, p. 91.

As was said by Justice Field in the Eureka case:

"The Act of 1872 preserves to the miner "the rights acquired by him under the Act "of 1866 and confers upon him these addi- "tional rights."

Eureka Case, 4 Sawy. 323.

"The Act of 1872 must be so construed as "not to impair any right which either had so "acquired."

Eclipse G. & S. M. Co., 59 Cal. 306.

In discussing the effect of the Act of 1872 on rights previously acquired, the Supreme Court

of the State of California expresses the following views, speaking through Justice Temple:

> " I think it would have been competent for " Congress to have required parties who " had equitable rights to patents to cause " such adjustments of their surface lines as " would indicate and define their extra- " lateral rights—in other words to have made " their end lines parallel before a patent " would issue, on pain of losing all extra- " lateral rights. There are no such provi- " sions in the Act of 1872, but the rights of " locators under former laws are expressly " confirmed to them."
>
> *Argonaut M. Co.* v. *Kennedy M. Co.*, 131 Cal. 15, 25.

This principle is restated and reaffirmed in the cause at bar.

Opinion Record, p. 89.

There are several cases in the Federal courts where the question under consideration has been considered—to which cases attention may be invited.

The case of *Carson City G. & S. M. Co.* v. *North Star M. Co.*, tried before Judge Beatty of Idaho sitting as Circuit Judge whose opinion appears in 73 Fed. 597, is an exact parallel to the one at bar.

We present herewith as Figure 2 a diagram from which the facts of the case may be readily understood.

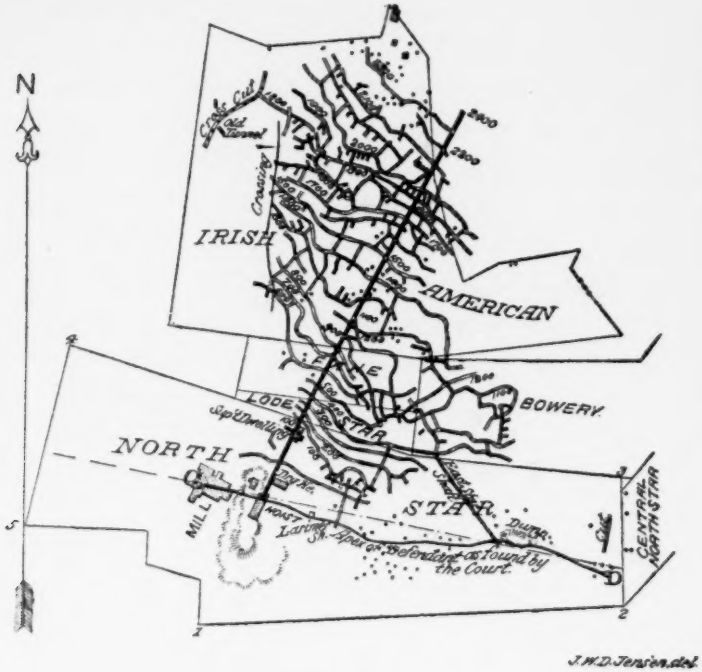


Figure 2

The North Star was a consolidation of a number of locations, all made before the passage of the Act of 1872. Patent was applied for September 15, 1869, and issued August 11, 1875.

See findings 83 Fed., p. 859.

Patent application was therefore pending, as in the case at bar, when the Act of 1872 was passed. The end lines were not parallel but converged in the direction of the dip (north). On its downward course the vein penetrated

underneath the surface of the Irish American, owned by the Carson City G. & S. M. Co., as shown by the extensive underground workings of the North Star Company, appearing in horizontal projection on the diagram. The Carson City Company as the owner of the overlying surface sued the North Star Company for the value of the ore extracted under the Irish American, contending as appellants here contend that, by reason of the non-parallelism of the end lines of the location, the apex proprietor was denied all extralateral right, and that the ownership of the ore bodies in controversy was an incident to the ownership of the surface.

The Court decided to the contrary. We quote from the opinion:

> "When these locations were made there "was no law requiring such parallelism, but "independent of all lines the right to follow "the ledge along its course for the full dis- "tance claimed and underground on its true "dip to any depth was undisputed. Although "section 9 of the Act of 1872 in repealing "certain parts of the old law provided that "'such repeal shall not affect existing rights' "the Courts have held that when any claim "is patented, those rights are controlled by "the patented lines."
>
> 73 Fed., p. 599.

This decision was affirmed by the Circuit Court of Appeals, the Court saying:

"The plaintiff in error contends that if the "patented area of the North Star is to be "considered as a location, its end lines are "not parallel, as found by the Court, and "that under section 2320, Revised Statutes, "the defendant in error possesses no extra-"lateral right under it. The Act of 1866 "under the provisions of which the patent "in this case was applied for, and under "which the rights of defendant in error ac-"crued, did not require parallelism of end "lines."

83 Fed. 658, 669.

The Carson City Company applied to this Court for a writ of *certiorari* to review this decision, but the Court declined to interfere.

Mem. Decision, 171 U. S. p. 687.

In a case decided by Judge Hawley sitting as Circuit Judge, prior to the ruling in the North Star case, a similar doctrine in a case of converging end lines was applied to the Wyoming or slate vein involved in that case, (*Cons. Wyoming* v. *Champion M. Co.*, 63 Fed. 540, 542) and the extralateral right of the Wyoming Company on this vein was determined to have ceased at the point of junction of the converging end line planes as illustrated in the annexed diagram.

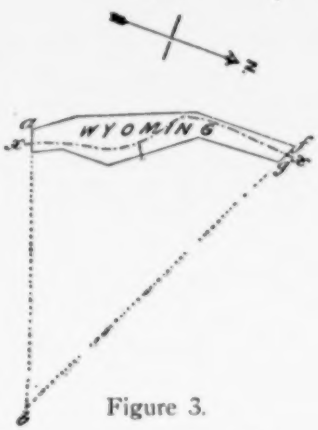


Figure 3.

Plaintiffs in error take the position that the patentee of the Summit Quartz Mine having accepted a patent issued after the passage of the Act of 1872, he is bound by the provisions of the law requiring parallelism of end lines, and that because he did not commence his patent proceedings *de novo* after the passage of the Act of 1872, go into the field, reform his lines, and post and publish a new notice, no extralateral right accrued to the patentee because the end lines converge in the direction of the dip. Their main reliance to sustain this position rests on the opinion in the case of *New Dunderberg* v. *Old*, 79 Fed. 598. Counsel misapprehends the opinion in this case, as the Supreme Court of California in its opinion in the cause at bar clearly points out.

Opinion Record, p. 90, fols. 207, 208.

The following diagram (Figure 4) illustrates the facts of Dunderberg v. Old case.

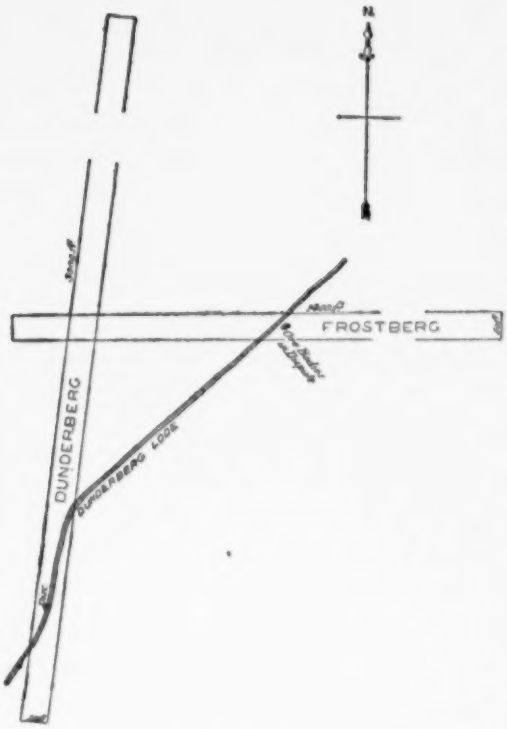


Figure 4.

Both the Frostberg and Dunderberg lode claims were located under the Act of 1866. The Frostberg had passed to entry prior to the passage of the Act of 1872. The Dunderberg evidently applied for a patent under the Act of 1872. The vein, as will be observed from the diagram, instead of passing through the Dunderberg claim parallel to the lines located as side lines crossed it diagonally—on its course—passing out of the east side line, and after traversing

the intervening space between that line entered the south line of the Frostberg and passed out of the north line of that claim. The ore bodies in dispute were within the Frostberg lines. The owners of the Dunderberg contended that having located the claim under the Act of 1866, they had a right to follow the vein on its *course* or *strike*, outside of and beyond their patented boundaries, and into the Frostberg, the prior claim. The Court held that the Dunderberg owners having fixed their surface boundaries, purporting to inclose the vein, they were bound by them, and could not pursue the vein on its *course* beyond the vertical boundaries of the Dunderberg claim.

As the Court significantly said:

> "It was not the repeal of these sections of "the Act of 1866 that affected the rights of "the owner of the Dunderberg Lode. That "repeal did not deprive him of any right he "had to follow his lode into the Frostberg "claim. It was his location, entry, and "patent of his claim from which the lode "departed on its strike 300 feet before it "reached the Frostberg that affected his "rights."
>
> *New Dunderberg* v. *Old*, 79 Fed. 598, 605.

It is quite manifest that the owner of the Dunderberg would have found himself precisely in the same legal predicament, and the decision of

the case would necessarily have been the same had the patent to the Dunderberg claim been issued prior to the passage of the Act of 1872. In this respect both acts were based upon the principle heretofore alluded to—that when the locator inclosed his vein within defined surface boundaries he could not follow the vein in its course or strike beyond these boundaries.

Wolfley v. *Lebanon*, (Act of 1866), 4 Colo. 112;

McCormick v. *Varnes*, (Act of 1866), 2 Utah 355;

Flagstaff v. *Tarbet*, (Act of 1866), 98 U. S. 463;

Eureka Case, (Act of 1866), 4 Sawy. 302.

Argentine v. *Terrible*, (Act of 1872), 122 U. S. 478.

Counsel for plaintiff in error cite the case of *Lakin* v. *Dolly*, 53 Fed. 337, in aid of their contention. There is this to be said concerning that case. In the first place the controversy there was over surface ground only. In the second place the Circuit Court of Appeals in subsequent cases so explained the doctrine of the Lakin-Dolly case as to deprive appellant's argument of all plausibility.

We present a diagram (Figure 5) showing the Mammoth Claim, the property involved in the Lakin cases. The shaded lines represent the ground as to which the Court held the patent was

valid. The unshaded portion embraced the town of Johnsville covering 252-95 acres of land connected with the location of one lode, and as to this portion the Court held the patent to be void.

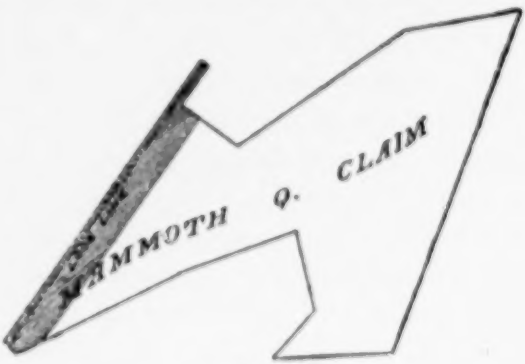


Figure 5.

The application for patent was made in 1867 but no entry or payment was made until 1877.

It appeared at the trial of the case *upon an agreed statement of facts* that when the Mammoth claim was located, there was no local rule, usage or custom authorizing the surface to be appropriated in excess of 100 feet on each side of the vein, and that the unshaded area shown in the diagram never was covered by the Mammoth location. This was an admission which practically went to the jurisdiction of the Land Department to grant a patent for an area in excess of the quantity allowed by local rules.

At all events, the case has since been twice explained by the same appellate court which

handed down the opinion. The first explanation will be found in *Carson City Min. Co.* v. *North Star Min. Co.*, 83 Fed. 658, the opinion being written by Judge Hawley who originally decided *Lakin* v. *Dolly*, (53 Fed. 333). In the recent case of *Peabody Gold Mining Co.* v. *Gold Hill M. Co.*, 111 Fed. 817, the same Court thus disposes of the *Lakin* v. *Dolly* case:

> "The admitted facts effectually rebutted
> "the presumption which otherwise would
> "have attended the patent, the presumption
> "that the locator was lawfully entitled to
> "all the premises described in his grant and
> "that all of the previous requisites of the law
> "had been complied with."

A further argument of plaintiff in error upon this branch of the case may be noticed. This is in effect as follows:

The Act of 1872 conferred upon previous locators all lodes found within the claim other than the one previously acquired, title to which was confirmed by the Act. That the extralateral right awarded by the Act to these other lodes was predicated on a parallelism of end lines. As the end lines were not parallel, there is no extralateral right as to the other lodes. Therefore, there is no extralateral right on the original lode. This is clearly a *non sequitur*. It may be noted parenthetically that there are no lodes other than the original involved in this action. If there

were it might be plausibly said that as to such lodes there would be no extralateral right, as the terms under which these other lodes were given to the prior locator, *i. e.*, parallelism of end lines, were not complied with. That if the applicant for patent had desired to avail himself of the grant of other lodes in their extralateral extensions he should have reformed his boundaries and paralleled his end lines. As to these other lodes the prior locator's rights date from the donative provisions of the Act of 1872, and are to be measured solely by the terms of that Act. As to the original lode it is accepted as a well-established rule of law that the title conveyed by a mining patent relates back to the inception of the right; that is to the location on which the patent is based.

Heydenfeldt v. *Dancy G. & S. M. Co.*, 93 U. S. 634;

St. Louis Smelting Co. v. *Kemp*, 104 U. S. 636.

Deffebach v. *Hawk*, 115 U. S. 392.

Calhoun G. M. Co. v. *Ajax G. M. Co.*, 182 U. S. 499.

Uinta T. & M. Co. v. *Crude and Cripple Creek M. Co.*, 119 Fed. 164; S. C. on *certiorari*, 196 U. S. 337.

The Supreme Court of California in its decision of the cause at bar as to this point expressed itself as follows:

"The patentee did not waive or renounce "any extralateral right by the acceptance of "the patent. It is true that the patent did "in accordance with the express provisions of "the Act of 1872 purport to grant in addi- "tion to the vein or lode originally located the "right to all other veins or lodes the top or "apex of which lay inside of the surface lines "of the location extended downward vertically "to their entire depth although in the course "downward they extended outside the verti- "cal side lines. It might perhaps be con- "tended with some force that as to the other "veins and lodes, which were not embraced "within the original location and the right "to which was for the first time given by "the Act of 1872, the requirement as to "parallelism of end lines might preclude any "extralateral right. But the patent in terms "also purported to grant the 1165.56 linear "feet of the original vein throughout its en- "tire depth between the end lines continued "in their own direction. By the acceptance "of such a patent there was no indication of "any intent to waive or renounce any right "to follow the vein between the end lines, "given by the original location for those "rights were expressly confirmed thereby and "plaintiff (defendant in error) bases its "claim entirely thereon. We cannot see that "the legal effect of such an acceptance was "a waiver or renouncing of any such right. "These particular rights the patentee was "entitled to, even though his end lines were

"not parallel and the fact that the patent "purported also to grant something else to "which he may not have been entitled can- "not affect his rights as to the original lode, "which are also confirmed by the patent. It "is true that the patent recites on its face "that it is issued in pursuance of the Act of "1872, but it also recites that it is issued in "pursuance of the Act of July 26, 1866, and "the Act amendatory thereof approved July "9, 1870, and in conjunction with the public "records in evidence shows that it was issued "upon locations made prior to May 10, 1872, "and upon an application pending at that "date."

Opinion Record, p. 90.

It seems to us that this construction of the law points the way out of serious difficulties. It gives to the law of 1872 a prospective operation as to anything purporting or claiming to have originated under it—avoids giving to the statute a retroactive effect—and gives full weight to its confirmatory provision. If this rule is to obtain the sanction of this Court, the Courts will not in the future be embarrassed in deciding cases where there are discovered secondary veins with erratic and differing dips within claims patented under the Act of 1866 with irregularly shaped surfaces, valid under the law under which they were issued as to the original lode, but creating extremely complex conditions as to secondary

veins where the end lines are not parallel. As to the original lode rights are preserved as the law plainly indicates they should be. As to the other lodes which were mere gratuities, no extralateral rights will be granted if the end lines are not parallel.

If the location of the Summit Claim be dealt with as one originating solely under the Act of 1872, the end lines, although not parallel, converge in the direction of the dip, giving the locator less of the vein underneath the surface than at the surface. The grant of the extralateral right within the converging end-line planes is within the spirit and intent of the Act of 1872, and therefore valid.

The object of the requirement in the Act of 1872 as to parallelism of end lines was to prevent the locator in following his vein downward from acquiring a greater length underneath the surface than he had apex at the surface.

Del Monte M. & M. Co. v. *Last Chance M. Co.*, 171 U. S. 55, 85.

As was said by this Court, speaking through Justice McFarland, (italics are ours):

"Of course, when end lines diverge to any "considerable extent from a perfect parallel, "they might, when extended in their own "direction, include on one side at least "greater length of ledge outside the side "lines than within them, and in such case,

"if the owner undertook to mine outside ore "in or near the diverging end line, some "difficulty might arise; *and it was, no doubt, "the purpose of section 2320 to prevent a "party from claiming more outside his lines "than within them.*"

Doe v. *Sanger*, 83 Cal. 203, 213.

The following excerpt from an opinion rendered by the Circuit Court of Appeals in the North Star case, heretofore cited, is at least persuasive (see Figure 2, *ante*):

"The end lines as marked on the diagram "converge in the direction of the dip giving "the patentees less of the vein or lode in "depth than they had at the surface. The "object of the Act of 1872 in requiring "parallelism of end lines was intended to "give to the claimant of the lode as much "of the lode or vein in its downward course "as he has at the surface but no more. It "appears from the findings that the defend-"ant in error was only allowed 2200 feet of "the apex of the lode because it was cut off "on the west by a 'crossing,' as shown in "the diagram. The restriction of its rights "in these particulars cannot be complained "of by the plaintiff in error."

Carson City G. & S. M. Co. v. *North Star M. Co.*, (C. C. A.), 83 Fed. 658, 669.

The Supreme Court of California in its opinion in the Argonaut-Kennedy case, in commenting on this last-cited decision said:

"A case has been cited in which the end "lines of the location converge in the direc- "tion of the dip. (*Carson City etc. Min. "Co. v. North Star Min. Co.*, 73 Fed. Rep. "597.) It was held that the locator had "extralateral rights because the conveyance "would give less, rather than more, on the "dip of the vein. This may be all right, as "it seems to me, however, not because the "patent carries less, rather than more, than "would pass had the end lines been parallel, "but because that which is granted is "described so that it can be definitely located. "Under the force of the restriction con- "tained in section 3 of the law of 1872, the "locator could not take beyond planes "through his end lines. This confined him "within well-defined boundaries to less on "the dip below the surface than he had upon "the surface. If this was an attempt to con- "strue the Act of 1872, the logic might be "questioned. That act, as construed, does "not grant extralateral rights, because the "end lines are parallel or converge toward "the dip of the vein, but if they are parallel. "The location there under consideration was "made under the Act of 1866, and carries "extralateral rights because the extent of "such rights are definitely described. At "least, such was the fact, and no other rea- "son was required. It was, therefore, not

"necessary in that case to consider the point "under debate," (that is, the extent of right with diverging end lines).

Argonaut Min. Co. v. *Kennedy etc. Co.*, 131 Cal., p. 29.

This we construe to be an approval of the conclusions reached by the Federal Court, with a suggestion that the reasoning upon which it was based is not altogether faultless.

Be that as it may, there can be no doubt that the object of the Act of 1872 in insisting upon parallelism of end lines was clearly to prevent the acquisition of a greater length along the vein underneath the surface than the locator had at the surface. A location with converging end lines does not fall within the reason of the rule, and therefore the rule is not applicable. The position of plaintiff in error in this connection may be thus summarized: The Summit owners could have acquired under the Act of 1872 by paralleling the end lines of the claim the same length on the vein underneath the surface throughout its entire depth as they had at the surface. They accepted a patent which purports to give them less underground than they had at the surface, therefore they acquired no part of the vein in depth outside of the vertical bounding planes. We respectfully submit that the conclusion is illogical. "Where the reason of the "rule ceases so should the rule itself."

The patent for the Summit Quartz Mine conveys in terms the underground segment of the vein between the converging end line planes. We think it may be plausibly said that this is a valid grant not only as confirmatory of the rights acquired under the Act of 1866, but because it is within the spirit and intent of the Act of 1872.

However we are not driven, considering the facts of this case, to the necessity of maintaining our rights as flowing solely from the Act of 1872. Our rights antedate the passage of that Act, and were specially preserved and confirmed by it.

As to the legal effect of the quitclaim deed to the Toman Ranch, purporting to have been executed by the Central Eureka Company, Respondent, to the Appellants Toman.

There are no elements of Federal question involved in this branch of the case. The assignments of error assail the rulings of the trial court in sustaining objections to the evidence. We do not think this branch of the case properly before this Court, or that it is entitled to consideration on this writ of error. But as counsel for plaintiff in error has submitted a discussion of the question, we take the liberty of replying.

We think we have clearly demonstrated that at the time of the execution of the quitclaim deed

by defendant in error to plaintiff in error Toman, defendant in error was vested by virtue of the United States patent issued to its predecessor with the fee simple title to the Summit Quartz Mine and the vein having its apex therein, together with all the underground parts of such vein lying between vertical planes drawn through the converging end line planes extended in their own direction.

This being true, the title to that part of the vein lying vertically underneath the surface of the Toman Ranch was severed from the title to the ranch. It was in law an integral part of the Summit Quartz Mine, and could not pass under a conveyance which described only the Toman Ranch.

We reproduce the description contained in the deed:

> "That portion of sections eight and seventeen, township six (6) north, range eleven (11) east, Mt. Diablo base and meridian, lying north of the center of that certain wagon road extending between the town of Ione and Volcano, and known as the Ione and Volcano wagon road, and *lying east of that certain patented mining ground known as the Summit Quartz Mine*, and also east of that patented mining ground known as the Amador Consolidated Mine." (See diagram, *ante*, Figure 1.)

This description necessarily excludes the Summit Quartz Mine and everything pertaining to the "*patented mining ground.*"

The grant to the Summit patentee was of the vein having its top or apex within the claim, throughout its entire depth, between the converging end line planes.

The grant of this extralateral right follows from the statute, whether effect be given to the express grant of that right in the patent or not.

> *Doe* v. *Waterloo Min. Co.*, 54 Fed. 935, 941.

The underground segment of the vein within the Summit end line planes lying underneath the surface of the Toman Ranch would pass by a conveyance of the Summit Quartz Mine, by name, or by description of its surface boundaries.

This principle finds ample authority in the decision of Judge Field in the Eureka case, in which he was supported on appeal by the Supreme Court of the United States.

> *The Eureka Case*, 4 Saw. 302, 326, S. C. on appeal, 103 U. S. 839.
>
> See, also, *Boston and M. Consol. C. and S. Co.* v. *Montana Ore Purchasing Co.*, 89 Fed. 529, 532.

Such a deed, as Judge Field points out, with reference to an agreement fixing a common boundary between two mining claims, neces-

sarily conveys all that the location on the surface carries.

As a corollary to this principle, no part of the extralateral right on a vein acquired through a Federal mining location would be conveyed by a deed simply describing land adjoining into which the vein penetrated. As appears from the cases, this is true where the contiguous land conveyed is the subject of patent under the mining law; *a fortiori* should it be true when land patented under the agricultural laws is conveyed.

A few illustrations from the adjudicated cases will serve to demonstrate this.

Among the numerous controversies arising out of conflicting locations in the Coeur d'Alenes, Idaho, was one involving the respective rights of four mining claims, the relative situation of which is shown on the accompanying diagram (Figure 6):

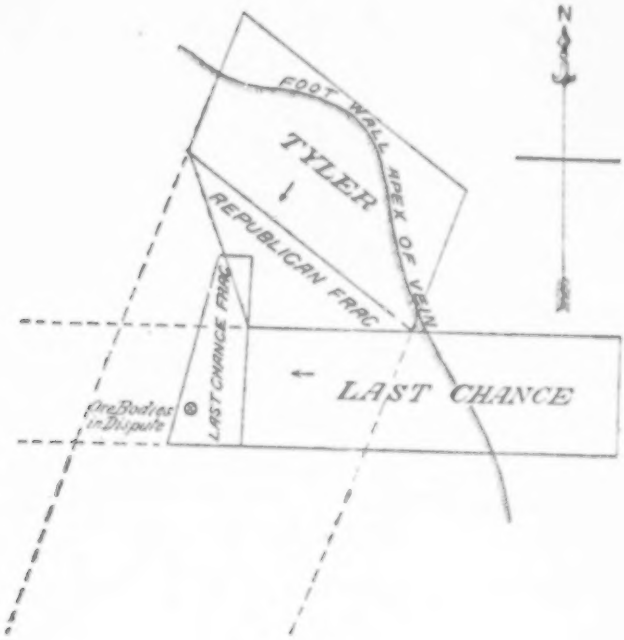


Figure 6.

Priorities had been adjudicated as follows: The Last Chance was first, the Tyler second, and the Last Chance Fraction and Republican Fraction were junior to the first two. The lode passed through the two side lines of the Last Chance, making these lines the true end lines of the claim.

Last Chance M. Co. v. *Tyler M. Co.*, 157 U. S. 683.

On its downward course between these extralateral right planes the vein passed underneath the surface of the Last Chance Fraction and Re-

publican Fraction claims, held in different ownership from either the Tyler or Last Chance.

The extralateral right of the Tyler was adjudicated to be within its end line planes, i. e., to the southward the vein on its downward course passing between these end line planes underneath the surface of the Republican Fraction and Last Chance Fraction, also the Last Chance, but by reason of the latter's priority over the Tyler, the Tyler Company lost so much of the vein underground as was found within the Last Chance end lines, and these lines produced westwardly. At one stage of the litigation the Last Chance Company filed a pleading by which it disclaimed all right, title, or interest in or to the Last Chance Fraction and the Republican Fraction. Subsequently the Tyler Company, asserting its right to the vein within its end line planes underneath the surface of the Republican and Last Chance Fractions, and within the Last Chance extralateral right planes, contended that by this disclaimer the Last Chance Company was estopped from claiming any part of the vein underneath the two fractional claims, notwithstanding its priority and apex ownership in the Last Chance claim. Touching the contention, the Circuit Court of appeals said (italics are ours):

> "The suggestion of counsel for the appel-
> "lant that the Last Chance Company, by its

"pleadings, disclaimed all interest in the "vein in question underneath the surface of "the Republican and Last Chance Fraction "Claims, is not supported by the record. "The Last Chance Company did disclaim "any interest in either of these claims, but, "inasmuch as the vein in question has its "apex within the surface lines of the Last "Chance location, and on its dip under the "true side lines of the Last Chance location "passes under the surface of the Republican "and Last Chance Fraction claims, *it is in "its descent as much a part of the Last "Chance location as if entirely within its "surface lines. It constitutes no part of the "Republican or Last Chance Fraction claims, "and therefore, in disclaiming any interest "in these claims, the Last Chance Company "did not thereby disclaim any interest in the "vein."*

Tyler Min. Co. v. Last Chance Min. Co., 90 Fed. 15, 21.

Suppose the Last Chance Company in the case above cited had owned the three claims—the Last Chance, the Last Chance Fraction, and the Republican Fraction—and had conveyed the two last named, without reserving in terms the extralateral right pertaining to the original Last Chance, could it be contended for a moment that it lost the Last Chance extralateral right, which accrued to it by virtue of the ownership of the apex within the Last Chance surface? Certainly

not, according to the principle announced by the Circuit Court of Appeals. So in the case at bar. If the Central Eureka Company owned both the Summit Mine and the Toman Ranch, its deed to the Toman Ranch would not convey anything pertaining to the Summit Mine.

The principle for which we contend is clearly upheld in a case recently decided by the Circuit Court of Appeals, Ninth Circuit, the facts of which may be best illustrated by the use of a diagram (Figure 7).

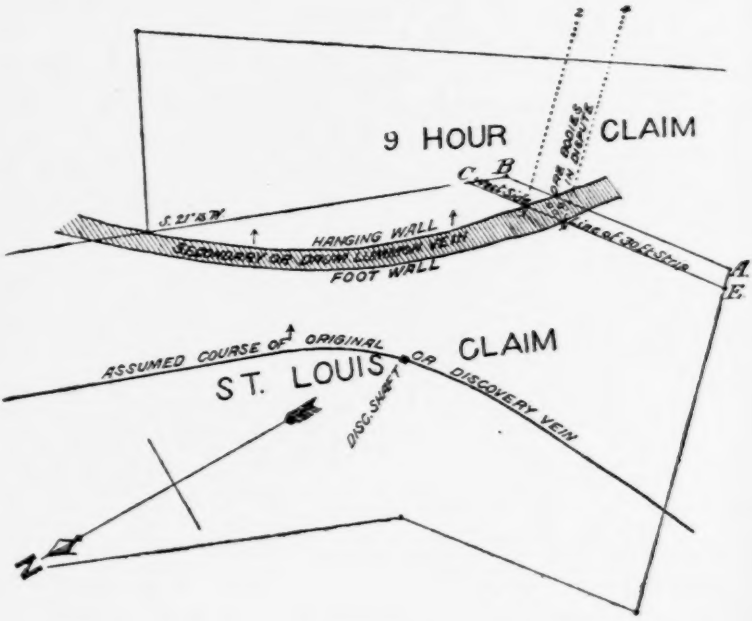


Figure 7

The St. Louis Mining and Milling Company were the owners of the St. Louis Claim, and the Montana Mining Company owned the Nine Hour. Priority was with the St. Louis. Its owners applied for a patent when a controversy arose with owners of the Nine Hour over the boundary between the two claims. A compromise was agreed upon, under the terms of which the St. Louis Company agreed, in the event of its obtaining a patent, to convey to the Montana Company what was called the thirty-foot strip, defined in the above diagram by the letters A, B, C, E.

This conveyance was subsequently executed and delivered, in which the thirty-foot strip was deeded by metes and bounds, "together with all "the mineral therein contained, together with "all the dips, spurs and angles, and also all the "metals, ores, gold and silver-bearing quartz "rock and earth therein."

Subsequently a cotroversy arose over certain ore bodies found underneath the surface of the thirty-foot compromise strip, the St. Louis Company contending that they belonged to a vein (the secondary or Drum Lummon vein shown on the diagram) having its apex within the St. Louis claim. The Montana Company claimed that the ore bodies passed to it under its deed to the thirty-foot strip.

The Court held that—

> " In interpreting the conveyance in ques-
> " tion regard must be had not only to its
> " terms, but to the subject-matter involved
> " and the surrounding circumstances, in
> " order to ascertain the intention of the
> " parties. Said the Court in *Richmond M.*
> " *Co.* v. *Eureka M. Co.*, 103 U. S. 846, 'The
> " 'language used is to be construed with
> " 'reference to the peculiar property about
> " 'which the parties were contracting.' "

It awarded the ore bodies to the St. Louis Company for the reason that the apex of the vein was within the St. Louis claim, and outside of the thirty-foot strip which was conveyed. It will be observed that in the deed involved in that case there not only was no reservation, but the language of the conveyance specified with particularity "all mineral therein contained . . . " all the metals, ores, gold and silver-bearing " quartz, rock and earth therein." In the case at bar the conveyance contains no such language. It is a naked quitclaim to the agricultural land east of the Summit Mine.

In the trial court, counsel for Plaintiffs in Error relied upon the case of *Stinchfield* v. *Gillis*, 96 Cal. 33, and 107 Cal. 84, as authority for their contention that the Central Eureka Mining Company is estopped by its quitclaim deed from asserting any right to that part of the Summit vein underneath the surface of the Toman Ranch. From the reliance placed upon the case in the

lower court and the possibility that they may in their reply to this brief invite this Court's attention to it, we deem it expedient to give our views upon it.

The facts may be illustrated by the following diagram (Figure 8).

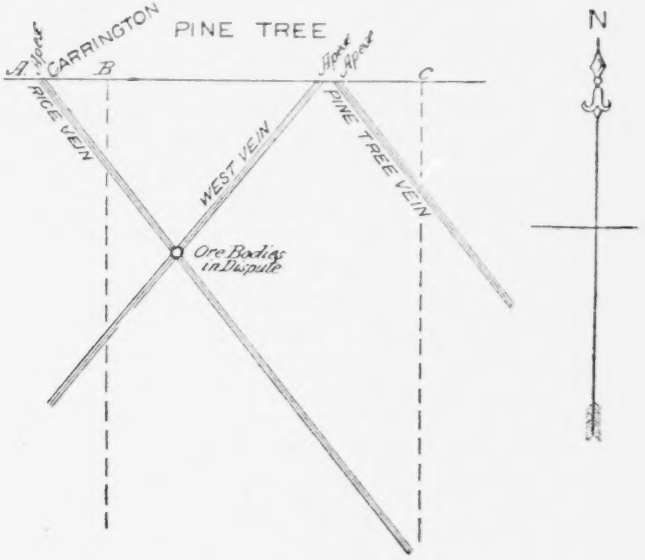


Figure 8.

This is a longitudinal section, the vertical bounding plane between the Carrington and the Pine Tree being represented by the line B-D. The other details shown on the section are self-explanatory. The facts and history of the case are substantially as follows:

One Carrington was originally in possession

of a certain mining claim, consisting of a tract of land about 750 feet in length by about 450 feet in width. After leaving the section of the country where this property was situated, he transferred the same to defendant Gillis. However, no valid location, as required by the laws of the United States, had ever been made.

On January 17, 1866, Gillis, by bargain and sale deed, conveyed to plaintiff Stinchfield a portion of this claim, being a strip of land 171 feet in width on the eastern side thereof.

The strip thus conveyed became known as the Pine Tree mine, and contained two veins, the Pine Tree vein, (which may be omitted from consideration here), dipping to the east, and the west vein, dipping to the west. On the remainder of the Carrington claim there were three systems of veins, all dipping to the east, known respectively as the Carrington vein, the Criss vein and the Rice vein. The Rice vein was composed of three small veins running parallel and in close proximity. Neither the Carrington nor Criss veins are shown on the diagram, as they are not necessary to a proper understanding of the case. The conflict arose over the intersection of the West vein with the Rice vein.

The veins in both claims run in a northwesterly and southeasterly direction, with the exception of the West vein, which runs north and south; and all dip to the east, with the exception

of the West, which dips to the west, and crosses the veins from the Carrington claim at nearly right angles. The only place where gold occurs is at these crossings.

On the day following the conveyance of the Pine Tree mine Gillis located, according to law, the remainder of the Carrington claim. Two days after Gillis had made this location plaintiff Stinchfield also relocated the Pine Tree mine.

Subsequently, while following the Rice vein on its dip under the Pine Tree ground, the tenants of the defendant Gillis encountered the West vein at its intersection with the Rice vein at the point marked on Figure 8 "Ore bodies in dispute." They continued work and extracted all the gold to be found within the space of such intersection. Later plaintiff Stinchfield while working on the West vein, broke into defendant's works at the point of intersection, and found that defendant had already extracted all the gold in that space.

Plaintiff then brought this action for $10,000, the value of the gold alleged to have been removed from the said space of intersection.

The lower court gave judgment for defendants.

The plaintiff on appeal contended that by his deed from defendant Gillis, which purported to convey a mining claim, he became, *as against said defendant and those claiming under him,*

the absolute owner of the surface ground, and of all veins, lodes or ledges having their apices therein, and as a consequence he was the owner of all the gold in the West vein, which apexed in his ground, including that in the space of intersection with the Rice vein. That defendant was estopped by his bargain and sale deed to set up any title to the gold in dispute, or to deny that he had a valid location at the time of the conveyance; that a grantor cannot, after purporting to convey a fee simple estate, subsequently acquire a title to defeat that of the grantee; and that therefore defendant cannot rely on his location, subsequent to the conveyance to plaintiff, to establish a priority in his own claim, which would defeat the right of the plaintiff to the gold in a vein having its apex in plaintiff's land, at a point of intersection with a vein apexing in defendant's ground. Such a course, it was contended, would be equivalent to defendant, representing himself to be the owner of a mining claim which had not been validly located, conveying a portion of the same to plaintiff by bargain and sale deed, and then relocating the whole of the original claim, including that sold to plaintiff, and thus defeating the title he had purported to convey.

On the other hand, defendant's contention was that by section 2336, Rev. St., where veins of different owners intersect, the one having prior-

ity of location is entitled to the ore contained in the space of intersection. That at the time of the conveyance to plaintiff there was no valid location on either claim; that by relocating his claim before plaintiff relocated, defendant acquired the prior location; that at the time of executing the deed defendant had ouly a possessory title, and had in no way connected himself with mining laws of the United States, under which only the rights to these veins could be claimed. That the rule concerning estoppel only applies where there is no proof of *subsequently acquired title from a paramount source;* that defendant claims no right to anything granted to plaintiff, but only the right to follow the vein on its dip, and to have the right to ore at the point of intersection determined by the mining laws.

The court on the first appeal held substantially in accordance with the views of the plaintiff: That after bargain and sale deed defendant could not subsequently obtain any title which he could assert to limit the grantee's estate, and that by his deed defendant was estopped from denying his own title in fee at the date of that conveyance, and therefore necessarily estopped from denying a valid location by himself or his grantor as the basis of such title. "It follows "that no right whatever accrued to the grantor "Gillis *as against his grantee*, the plaintiff, by

"virtue of his subsequent location." The deed of the mining claim passed the Pine Tree Mine, *as against the grantor*, to the same extent as a patent from the U. S. would have done, and included every vein throughout its depth, *which had its apex within the surface boundaries of the claim.*

The order was reversed, cause remanded for new trial.

96 Cal. 33.

On the second trial defendants amended their answers to show that as a matter of fact the Carrington claim originally consisted of two claims, one called the Carrington, and the other the Pine Tree, and the former was located several years before the latter, and the Court so found; but found also that after working such locations Carrington treated them both as one claim, as also did Gillis, and that the boundaries of the portion conveyed to plaintiff did not correspond with the original Pine Tree location.

Defendants contended that since by this state of facts the Carrington was the prior locator, the deed to plaintiff conveyed to him all veins, lodes and ledges having their apices upon the Pine Tree mine throughout their entire depth, but if any such veins, lodes, or ledges intersected any vein, lode, or ledge having its apex on the Carrington, then the ore, at such point of intersec-

tion would belong to the Carrington as the prior location; since under the mining laws, the ore at such point never formed a part of the Pine Tree claim, the junior location which had been conveyed to plaintiff.

The lower court gave judgment for plaintiff, and on appeal the Supreme Court of California held that the ground held by Carrington must be considered as one claim; that whatever distinction may at one time have been observed between the original location of the Carrington Mine and that of the Pine Tree Mine, it was disregarded by Carrington during a large portion of the time these claims were held by him; and they were treated as one claim by his grantee, Gillis. That if the locator of a mining claim conveys a portion of his claim, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, *in any vein whose apex was within the surface lines of his deed.* In such cases sec. 2336, R. S. of U. S., has no application. Said section was intended merely to regulate the rights of different proprietors claiming under different locations. As the deed contains no reservation, and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms, by holding that the entire West vein within the surface lines, even though intersected by another, passed to

the plaintiff. "In thus holding we concede that, "when mining ground is conveyed by deed without express limitation, the grantee takes subject "to the characteristics of mining property given "to it by prevailing customs and laws, and not "with the absolute dominion which flows from "a conveyance in fee of ordinary land. . . . "Whether the plaintiff would have been entitled to follow the West vein into the ground "retained by Gillis and to claim the gold found "therein, or whether Gillis would have been "entitled to any of the gold that might be found "in the Rice vein within the ground conveyed "to plaintiff, are questions which are not involved in this appeal, and upon which we do "not express any opinion. All that we hold is "that inasmuch as the gold in question was "within the ground conveyed by Gillis to the "plaintiff, *and in a vein whose apex was within "the surface lines of that ground,* it belonged "to the plaintiff."

107 Cal. 84.

From the foregoing analysis of the case it will be observed that the question involved in the case at bar was not decided. If the ground quitclaimed in the case at bar had been conveyed as *mining ground* as was done in the Stinchfield-Gillis case, instead of purporting to relinquish only land patented as agricultural; and if in addition the right of Gillis to follow the Rice

vein *beyond the intersection* with the West vein, underneath the Pine Tree had been challenged, a situation similar to the one involved in the case at bar might have been presented. But the Supreme Court of California distinctly announced that as to this question it declined to pass upon it.

It will be further observed that the Court fully appreciates the force of the principle announced in the St. Louis-Montana case heretofore discussed. The owners of the Pine Tree were awarded the ore bodies in dispute because in the portion of the claim deeded to them was found the *apex* of the West vein, and the conveyance conveyed the vein.

We fully recognize the general principles urged by counsel for Plaintiff in Error as to the force of a quitclaim deed, and the general common-law rule that a conveyance of land carries the minerals unless reserved; but we insist that such rule has no application to the case at bar.

In speaking of the applicability of this common-law doctrine (*cujus est solum*, etc.) to mining conditions of the West, Justice Beatty, now Chief Justice of California, then sitting on the Supreme Court bench of Nevada, said:

> "The doctrine of the common law, that "he who has a right to the surface of any "portion of the earth has also the right to "all beneath and above that surface, has but

"a limited application to the rights of "miners and others using the public lands "of this State. Necessity has compelled a "great modification of that doctrine. . . . "To adhere to the common-law rules on this "subject is simply impossible. To attempt "to carry out common-law doctrines on this "point would either give all the houses in "Virginia to the mining corporations, or "else all the most valuable mines to those "occupying the houses. The well-estab- "lished custom of miners to locate veins of "mineral, claiming to follow them with all "their dips, spurs, and angles, without ref- "erence to the occupancy of the surface, has "compelled a departure from common-law "rules."

Bullion M. Co. v. *Croesus M. Co.*, 2 Nev. 687, 696.

(This was said for the Supreme Court of Nevada in July, 1866,—the very month when this departure from the common-law doctrine ceased to depend alone on the custom of miners and received the express sanction of the national legislature in the Lode and Water Law of 1866.)

The Summit vein was not in law a part of the Toman Ranch. It was, as the authorities heretofore cited assert, as much a part of the Summit mine as if it had been entirely within its vertical boundaries. This was the view taken by the Supreme Court of California and was undoubtedly correct.

An examination of the quitclaim deed in the light of the surrounding circumstances, the different character of the two properties and the apparent motive for the conveyance, disclose a manifest intent not to convey to Appellants any part of the property which belonged to Respondent by virture of its patent to the Summit Quartz Mine.

It is a familiar rule that for the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it may also be shown so that the Judge may be placed in the position of those whose language he is to interpret.

C. C. P. of Cal., sec. 1860.

The evidence introduced at the trial by the Plaintiffs in Error here, furnished all the light that is necessary to enable the Court to construe the instrument in the light of the circumstances, the situation of the subject of the instrument and of the parties to it.

The deed in question contained the following recital:

> " This deed is made pursuant to the au-
> " thority and resolution of the Board of Di-
> " rectors of party of first part at a meeting
> " thereof held December 31st, 1898."

Trans., fol. 437.

This resolution was introduced in evidence by the appellants prior to the offer of the deed. It will be found in full in the record.

Trans., fols. 360, 372.

From this resolution the ratification of the deed by the stockholders and the other conceded facts found by the Court the circumstances surrounding the execution of the deed clearly appear and may be briefly outlined.

On October 23, 1897, The Central Eureka Company, Defendant in Error here, owned the Summit mine, and the Plaintiffs in Error, Toman, owned the agricultural land which we call the Toman Ranch, lying east of the patented Summit mine. On that day a contract was entered into between the Company and the Tomans, and certain instruments were executed and deposited in escrow with the Bank of California granting to the Central Eureka Company certain privileges with regard to the Toman Ranch. This contract is styled in the resolution a "bond and "option," by which the Tomans had agreed to sell to the Central Eureka Company the Toman Ranch and the Central Eureka Company agreed to purchase the same.

See ratification of stockholders, Trans., fol. 125.

Subsequently the parties to this bond and option mutually agreed to cancel it and withdraw the papers from escrow.

As a consideration of such cancellation the Central Eureka agreed to pay the Tomans $1000; give them its note for $750, and execute a quitclaim deed for the Toman Ranch and as expressed in the resolution (italics are ours):

> "It is further resolved that the President "and Secretary of this incorporation be and "they are hereby authorized to sign, exe- "cute, and deliver all proper and necessary "papers *requisite and necessary to cancel "said contract and to free the land and titles "of said Tomans from any incumbrance.*"

In other words in order to be released from its contract to purchase the Toman Ranch the Central Eureka agreed to pay a cash consideration of $1000, execute a promissory note for $750, and execute all necessary papers requisite to free the land and titles of said Tomans. In other words, to place them in the same position as to such title as they occupied prior to making the contract "bond and option." The quitclaim deed was selected as a method of accomplishing this purpose. The contention of Plaintiffs in Error is that the quitclaim deed not only freed the land and titles of the Tomans, but also conveyed the most essential and valuable part of the patented Summit mine to wit: the extralateral right on the vein having its apex within the Summit claim, which part of the vein is specially reserved out of the patent to the Toman Ranch.

Findings, trans., fol. 90.

In other words, the Tomans were restored to their original estate, received a money consideration, and acquired title to the principal part of the Summit mine, as a consideration for the cancellation of a "bond and option" to purchase the Toman Ranch.

It seems to us that the mere statement of the facts is sufficient to demonstrate the utter lack of plausibility in the contention of Plaintiffs in Error.

Conclusion.

We respectfully urge that we have fully answered all the objections raised by the Plaintiffs in Error. The foregoing argument applies with equal force to all such exceptions and objections, whether directed to the action of the trial Court in refusing a non-suit, rejecting offered evidence, or in reaching the ultimate conclusions upon which the judgment rests.

We respectfully submit that the decision of the Supreme Court of California should be affirmed.

CURTIS H. LINDLEY,

Attorney for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 141.

EAST CENTRAL EUREKA MINING COMPANY ET AL.

vs.

CENTRAL EUREKA MINING COMPANY.

REPLY TO SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

CURTIS H. LINDLEY,
S. S. BURDETT,
Attorneys for Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24731

SUPREME COURT OF THE UNITED STATES.

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EAST CENTRAL EUREKA MINING CO. ET AL.

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Reply to Supplemental Brief for Plaintiffs in Error.

I.

Plaintiffs in error, at pages 4 and 5 of their supplemental brief, enter upon an analysis of section 2 of the act of May 10, 1872, and for that purpose divide it into four "sentences." The third "sentence" is the one from which the conclusion relied upon is drawn. It reads:

"No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary."

The contention based on this sentence is thus stated:

"The third sentence establishes the width of all claims, as we shall contend, whether located before or after the passage of the act, as is evident from the exception the sentence con-

tains, 'where adverse rights *existing at the passage of this act* shall render such limitation necessary.' The wording of this exception conclusively shows that the sentence refers to both classes of locations."

We presume that by "both classes of locations" to which counsel thus refers is meant those lode claims made under the act of 1866 (which were alone in existence on May 10, 1872) and those which should thereafter be made or located under the act of 1872.

Undoubtedly, adverse rights existing at the passage of this act, founded on the act of 1866, would and did after 1872 stand in the way of the prohibition against limiting the surface of claims to be thereafter located "to less than 25 feet on each side of the middle of the vein." But so also did, and do, adverse rights under the act of 1870 (the placer act), under the Spanish and Mexican grants in California, Arizona, and New Mexico, many of which are in the mining regions of those States and Territories, and so also do adverse rights under the agricultural laws (homestead, desert land, etc.). In other words, whenever the vein discovered after the passage of the act of 1872 lay along a tract of land segregated as a lode location under the act of 1866, and so near to its boundary that less than 25 feet separated the center of the vein from the line of the segregated location, "the adverse rights" existed, which the statute declares shall excuse a location having less than 25 feet in width. As before remarked, the result would be exactly the same had the too-near "adverse rights" been the line of a placer claim, of a Spanish grant, or a homestead or desert land claim.

It is plain to be seen that where the *obstacle* is a location under the act of 1866, it stands supreme as against the quoted requirement of the act of 1872, and that that act intended that it should.

We submit, therefore, that there is no merit in the contention founded on this so-called "third sentence" in the second section of the act of 1872 which seeks to couple this

saving clause as to a few feet of surface ground with that "fourth sentence" which, relating to end lines, involves the chief value of the mines. An excusatory clause on so small a matter is not foundation enough on which to carry backward so heavy a load of disaster as would be the imposition of the end line theory of the act of 1872 upon the properties acquired under the act of 1866 and the preceding local rules and regulations.

The aid invoked by the plaintiff in error (supplemental brief, p. 6), to their theory of the alleged section of the act of 1872, is not strengthened by *Lakin vs. Roberts*, 54 Fed., 461.

The quotation from the opinion in that case is thus made by counsel:—

"It is not contended that plaintiffs interests were so far vested that by that act Congress had no power to limit or vary them. We shall assume, therefore, that Congress had this power, and having it, we think it exercised it in the provisions we have quoted."

The inference drawn by the plaintiff in error from this paragraph taken from a case in which surface ground and surface rights alone were in controversy, is, that since in that case the learned justice delivering the opinion of the Circuit Court of Appeals held that no more than 300 feet of surface ground on each side of the vein could be lawfully included in a patent issued after May 10, 1872, though on a location made under the act of 1866, that therefore the holding must be that since the surface quantity of the act of 1872 may be applied to locations previously made, the end line provisions must follow and be applied.

The learned justice seems to have surmised that some such view might possibly occur to counsel as deducible from his position as expressed in the above quoted paragraph and was at pains to preclude any such view. Immediately after the

paragraph of Mr. Justice McKenna's opinion quoted above there follows the words:

"The language of the section of the Revised Statutes must be confined to preserving the application and of all righ except the size of the claim—length and width of it. A the provisions of the statute would not otherwise be give effect."

Congress, in passing the act of May 10, 1872, was declaring in exact words that mining caims *theretofore* located should, as to their *length* along the vein or lode, still continue to be governed by the "customs, regulations, and laws in force at the date of their location."

No specific grant of *surface* ground was made by the act of 1866. Under that act the claimant was required to file a diagram of his claim or of his "tract" "so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners." Length along the vein or lode was provided for, but nothing was enacted as to end lines. Hence the claim as located under the act of 1866 was continued by the act of 1872, for the 9th section of the later act expressly declares that the repeal of sections 1, 2, 3, 4, and 6 of the act of 1866 *"shall not affect existing rights,"* and that "applications for patents for mining claims now pending (May 10, 1872) may be prosecuted to a final decision in the General Land Office."

That the act of 1872 did not intend that any of its provisions should apply to or be enforced as to lodes or veins theretofore located under the act of 1866 is clear from the concluding section of the act of 1872, as follows:

"SEC. 16. That all acts and parts of acts inconsistent herewith are hereby repealed: *Provided,* That nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

Within 30 days after the passage of the act of May 10, 1872, to wit, on June 10, 1872, the Land Department issued

its instructions under the act of 1872, declaring therein, in paragraph 2, that—

"the status of lode claims located previous to the date thereof is not changed with regard to their extent along the lode or width of surface, such claims being restricted and governed both as to their lateral and linear extent, by the State, territorial or local laws, customs or regulations which were in force in the respective districts at the date of such locations, in so far as the same did not conflict with the limitations fixed by the mining statute of July 26, 1866."

Said circular, under the caption "Manner of locating claims or veins or lodes after the passage of the act of May 10, 1872," distinctly points it out that "from and after date of said act" no location can be made which—

1st. Exceeds 1,500 feet along the course of the vein.

2d. Which exceeds 300 feet on each side of the middle of the vein of the surface; and

3d. That the "end lines of such claims to be in all cases parallel to each other."

The eleventh paragraph of said regulations is as follows:

"Eleventh. By the foregoing it will be perceived that no lode claim located after the date of said act can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or State or territorial laws in force in the several mining districts; and that no such local regulations or State or territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse claims existing on the tenth day of May, 1872, render such lateral limitation necessary."

See Copp's Mining Decisions, pp. 275, 277.

These regulations are reproduced and re-established by paragraphs 2, 3, 4, 5, and 6 of the Official Mining Regula-

tions of the Land Department dated December 18, 1903, and now in force. (See, also, 28 L. D., pp. 594 and 595). They represent the mineral laws of the United States as they have been construed and administered by the Land Department for nearly thirty-five years, and as they are construed and administered today.

The contention of counsel that the "wording" of the "exception" to which they refer in the "third sentence" of the 2d section of the act of 1872 is diametrically opposed to this long official construction and administration of the law and is, we submit, utterly without merit or support in the statute itself.

Counsel for the plaintiffs in error repeat in their supplemental brief their former contention that the applicant for patent in the matter at bar had no vested rights under the act of 1866 which, so far as the United States was concerned, were not subject to defeat by the act of 1872, and this because payment for and entry of the land had not been made prior to the passage of the act of 1872, their reliance being primarily upon the *Yosemite Valley* case (15 Wall., 67), *Deffeback vs. Hawk* (115 U. S., 392), and *Davis vs. Wiebold* (139 U. S., 507, 517).

At page 3 of their original brief the other side maintained payment and entry to be the inception of any right of defendant in error, and cited *Davis vs. Wiebold*, 139 U. S., 239 (*sic*), 507, where they quote Mr. Justice Field as saying:

"According to *Deffenbach vs. Hock*, 115 U. S., 392, the patent to a mine relates back to the entry and payment of the price to the Government, and when the patent subsequently issued it took effect at the date of the entry, that being the earliest evidence of any movement for acquisition of any title from the Government."

We do not find in Davis *vs.* Wiebold (139 U. S., 507) nor in Deffeback *vs.* Hawk (115 U. S., 392) language which closely answers to the above paragraph as quoted, and are

quite sure that nothing is to be found in the Deffeback *vs.* Hawk case which sustains the point intended to be established by the quotation.

The paragraph in the Davis-Wiebold case referred to is found at page 517, where the court, expounding its decision in Deffeback *vs.* Hawk, said of the facts and proceedings *in that case:*

"Proceedings for the acquisition of the mining claim had been previously initiated, the entry of the same had been had, and payment of the price made to the Government; and when the patent subsequently issued it took effect by relation at the date of the entry, that being the earliest evidence of any movement for the acquisition of the title of the Government."

The *"earliest evidence"* to which the learned justice who delivered the opinion of the court in both of the cases cited referred had to do with the facts in the Deffeback case, not with a governing principle. In that case the mineral entry, the payment, antedated every claim of right set up by the town-site claimant. It was not necessary to set up any of the prior proceedings, nor were they set up. The governing principle was, however, declared in that case. In its concluding paragraph the court said (p. 530):

"In the several cases to which we have been referred in the fifth and sixth Montana Reports, *Silver Bow Mining Company vs. Clark,* 5 Montana, 378; *Talbott vs. King,* 6 Montana, 76; *Butte City Smoke-house Lode Cases,* 6 Montana, 397; which involved contests between parties claiming under mining patents and others claiming under town-site patents, and in which very able and learned opinions were given by the Supreme Court of the Territory of Montana, the mining claim patented had been located and the rights of the mining claimant had thus attached before the town-site patent was issued. The patent which subsequently followed was a mere perfection of the right originated by the location, and to which it took effect by relation. It was held, in accordance with this opinion, that the prior mining location was not affected by the town-site entry."

Turning now to the opinion in Deffeback *vs.* Hawk (155 U. S., 392-405), that part of it to which reference is had in Davis *vs.* Weibold is found at page 405, as follows:

"The complaint alleges, and the answer admits, that on the 20th of November, 1877, the plaintiff applied to the United States land office at Deadwood to enter the land as a placer mining claim, and that on the 31st of January, 1878, he did enter it as such paying the Government price therefor. No adverse claim was ever filed with the Register and Receiver of the local land office, and the entry was never canceled or disapproved by the officers of the Land Department at Washington. The right of the Government, therefore, passed to him; and though its deed, that is, its patent, was not issued to him until January 31, 1882, the certificate of purchase, which was given to him upon the entry, was, so far as the acquisition of title by any other party was concerned, equivalent to a patent. It was not until the 28th of July following that the probate judge entered the town site. The land had then ceased to be the subject of sale by the Government. It was no longer its property; it held the legal title only in trust for the holder of the certificate. Witherspoon *vs.* Duncan, 4 Wall., 210, 218. When the patent was subsequently issued, it related back to the inception of the right of the patentee."

The reference to Witherspoon *vs.* Duncan in that connection and the concluding clause, "*When the patent was subsequently issued, it related back to the inception of the right of the patentee,*" constitutes the strongest possible announcement or reiteration of the long-settled doctrine that the earliest act done in conformity to law for the acquisition of public land is the inception of title to which the patent when issued relates back.

To contend that a valid location made and maintained in accordance with the mineral laws of the United States, and the local customs and regulations, may be impaired, defeated, or destroyed before payment for and entry of the

land is utterly inconsistent with the rulings of this Honorable Court in

Noyes *vs.* Mantle, 127 U. S., 348.
Dahl *vs.* Raunheim, 132 *id.*, 262.
Forbes *vs.* Gracey, 94 *id.*, 762.

In conclusion, it may be added that there can be no question but that, in framing the act of 1872, the greatest care was taken to avoid even the appearance on the part of the United States of an intention to in anywise lessen, affect, or diminish the rights then held under locations at that time in existence.

Respectfully submitted,

S. S. BURDETT,
Attorney for Defendant in Error.

Supreme Court of the United States.

No. 141.—October Term, 1906.

East Central Eureka Mining Company, James Toman and Eliza A. Toman, Plaintiffs in Error, *vs.* Central Eureka Mining Company. } In Error to the Supreme Court of the State of California.

[January 21, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to reverse a decree in favor of the defendant in error, the original plaintiff and hereinafter called the plaintiff, which was ordered by the Superior Court and affirmed by the Supreme Court of California. Cal. . The decree was made on a bill to quiet title, upon the following facts, which appeared at the trial of the case. The plaintiff is the owner of the 'Summit Quartz Mine' in California. The apex of a vein runs through this mine between and nearly parallel with the surface side lines. This vein dips under the easterly side line and enters the adjoining land of the defendants, known as the Toman ranch. The controversy concerns the portion of the vein under the defendants' land. The main ground of defence is that the end lines of the mine are not parallel but converge towards each other in the direction of the ranch, and that the plaintiff's patent was granted on November 25, 1873, when the Act of May 10, 1872, c. 152, 17 Stat. 91, Rev. Sts. §§ 2320, 2322, was in force: *Iron Silver Mining Co.* v. *Elgin Mining & Smelting Co.*, 118 U. S. 196. *Del Monte Mining & Milling Co.* v. *Last Chance Mining & Milling Co.*, 171 U. S. 55, 67. But the patent was issued upon an application made on February 7, 1871, based upon two locations of March 20, 1863, and June 22, 1865, respectively. The question is whether the requirement of parallelism in § 2 of the Act of 1872, Rev. Sts. § 2320, applies to such a case.

The patent of the mine recites proceedings in pursuance of the Acts of 1866, 1870 and 1872, and describes and grants the premises by metes and bounds, with the exclusive right of possession and enjoyment of the same and of $1165\frac{56}{100}$ linear feet of the vein throughout its entire depth, although it may enter the land adjoining, with similar rights in other veins having their apex within the surface bounds; the extralateral or outside

rights in the veins being confined, as by the Act of 1872, § 3, to such portions as lie between vertical planes drawn downward through the end lines of the survey at the surface, and so continued in their own direction as to intersect the exterior part of the veins. In short, the patent purports to convey the rights claimed by the plaintiff in this suit, and also the additional rights that would have been gained by a location and patent under the Act of 1872 alone. The defendants derive title from later patents issued under the laws of the United States concerning the sale of agricultural land, and admit that, if the plaintiff's patent conveyed what it purported to convey, then, subject to a question to be mentioned later, the plaintiff must prevail.

Before the Act of 1872 it was not required that the end lines should be parallel; 118 U. S. 208; and when, with some dissent, it was decided that that requirement of that act made a condition to the right of a patentee to follow his vein outside of the vertical planes drawn through his side lines, the decision was confined in terms to cases where the location was made since the passage of the Act. 118 U. S. 208. That there is no such condition when the patent was issued in pursuance of proceedings under the earlier statutes has been decided, so far as we know, when the question has arisen. See e. g. *Argonaut Mining Co.* v. *Kennedy Mining & Milling Co.*, 131 Cal. 15. *Carson City Gold and Silver Mining Co.* v. *North Star Mining Co.*, 83 Fed. Rep. 658, 669. The granting of the patent indicates what we believe to be a fact, that the construction of the Act of 1872 adopted at the time by the land office agreed with the decisions of the courts. Unless, therefore, the meaning of the Act of 1872 is pretty plainly the other way, this consensus of opinion and practice must be accorded considerable weight.

Apart from the last mentioned considerations we are of opinion that the Act of 1872 authorized the plaintiff's patent. Under the former law the miner located the lode. *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 499, 508. When the Act of 1872 substituted the location of a piece of land by surface boundaries, it preserved the rights of locators to all mining locations previously made in compliance with law and local regulations, and provided that they should "have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of said surface locations." § 3. Rev. Sts. 2322. It is argued that this refers only to possessory rights, and that when a patent was applied for it was required to conform to the new law; that under the

old law the miner got but a single vein, while the new law gave him all veins having their apex within the surface, and that when he accepted this advantage he had to comply with the conditions, as otherwise he would be given a preference over later comers. It is said further that in the present case no rights had been acquired. These arguments do not command our assent, for reasons which we will state.

A broader construction of the passage quoted from § 3 is favored by other provisions in the Act. It provided that the repeal of certain sections of the Act of 1866 "shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the general land office; but in such cases when adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act." § 9. So in § 12. "Nor shall this act affect any right acquired under said act" (of 1866). And in § 16, "Provided that nothing in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws." Whatever ambiguity may be found in the first of these quotations, the last is plain. The chance of a possible advantage to outstanding applicants does not seem to us to outweigh the injustice of preventing them from getting what the law had promised as the reward for the steps they had taken in accordance with its invitation.

The provision that the act shall not impair existing rights is, perhaps, some indication that it extends to inchoate rights which constitutionally it might have impaired. At all events it should be taken in a liberal sense. There was no sufficient reason why the United States should not be liberal and, as we have said, it was just that it should be. We are of opinion that in the present case rights had been acquired within the meaning of the Act. It is said that the survey of the mineral patent was not approved or payment made to the United States until after the passage of the Act of 1872. But the location had been made and the proceedings under the Act of 1866 so far advanced as to exclude adverse claims. The locator had done all that he could do, and we are satisfied that the Act of 1872 intended to treat parties that were in that position as having rights that were to be preserved. If Congress were unrestricted by the Constitution the word rights still would be the natural word to express the relation of persons to this kind of property where the facts required the officers of the Government to take the steps necessary to permit them to acquire it and they were seeking to acquire it and had manifested their intent and desire by occupation, labor and expenditures. Yet on that supposition there could be no technically legal right. We believe that Congress used the word in a somewhat popular sense, as no doubt it would have used it in the case supposed, without considering what injustice might be within its constitutional power to commit. See *Clipper Mining Co.* v. *Eli Mining & Land*

Co., 194 U. S. 220. *Creede & Cripple Creek Mining & Milling Co.* v. *Uinta Tunnel Mining & Transportation Co.*, 196 U. S. 337, 342.

The plaintiff is not responsible for the form of the patent. It grants the rights that would have been granted under the Act of 1866, and the fact that it also purports to grant all that would have been acquired by a location under the Act of 1872 does not import an election by the grantee to abandon the former. We do not mean to disparage the additional grant, but, as was pointed out by the California Court, the question before us does not touch that point.

The defendants rely, for a further defence, upon a quitclaim deed, from the plaintiff, of the land under which lies the portion of the vein in dispute. The land was described as lying east of the mining ground known as the Summit Quartz Mine. Assuming, in accordance with its decision, that the part of the vein under this land was embraced in the the patent to the plaintiff and severed from the surface, the California Court held that this instrument did not purport to convey the portion of the vein beneath the surface and within the converging lines, produced, of the plaintiff's location. The Court also adverted to the fact, which sufficiently appeared, that the real object of the deed was to free the defendants' title from a previous contract on their part to convey the land, and simply to replace the grantees in their former position; and it sustained a finding of the Court below. The construction and effect of a conveyance between private parties is a matter as to which we follow the Court of the State. *Brine* v. *Hartford Fire Ins. Co.*, 96 U. S. 627, 636. *De Vaughn* v. *Hutchinson*, 165 U. S. 566. The assumption upon which that construction proceeded we have decided to be correct, and it is enough to add that there is nothing in the decision rendered last week in *Montana Mining Co.* v. *St. Louis Mining & Milling Co.* that prevents our agreeing with the result.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.